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Under the Superintendence and Control of the  
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Indian Appeals :

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

*Privy Council*

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REPORTED BY HERBERT COWELL,  
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CASES  
IN  
THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

JIWAN SINGH . . . . . DEFENDANT ;

AND

MISRI LAL . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT OF ALLAHABAD.

J. C.\*

1895

Nov. 14 ;  
Dec. 7.

*Hindu Law—Sale by a Hindu Widow—Consent of nearest Contingent Reversioner—Evidence of Consent—Right of Actual Reversioner.*

Where a Hindu widow sold through her husband's nearest contingent reversionary heir acting as her mokhtar a portion of her husband's estate, stating in the deed of sale that " the vendee has become an absolute owner of the share sold from the date of sale " :—

*Held*, that whatever the true construction of the deed, the High Court being of opinion that the transfer was limited to the widow's interest, there being no evidence of necessity, and the reversioner not having received any portion of the consideration, his consent to an absolute transfer was not sufficiently established, and that his grandson, being next reversionary heir when the succession opened, was entitled to eject the purchaser.

APPEAL from a decree of the High Court at Allahabad (May 20, 1892) reversing a decree of the Subordinate Judge of Aligarh (Dec. 7, 1890).

The property in suit, one-third of mauza Begpur Kanjaula, belonged to one Kashi Ram, whose heir, at the death of his

\* *Present* : LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS and SIR RICHARD COUCH.

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widow Gomti, was Meghraj, the father of the respondent, who sued to recover the same. The appellant was in possession as heir to his father, the purchaser of the property from Gomti, who sold it by a deed which purported to convey the absolute estate therein, and which was executed by Jaikishan Das, the grandfather of Meghraj, under a mooktarnamah in his favour granted by Gomti. Jaikishan was at the date of the deed the sole nearest reversionary heir of Kashi Ram. There was no evidence of necessity for the sale, nor of Jaikishan Das having received any portion of the purchase-money. The question at issue was whether under these circumstances the purchaser took the absolute estate of the deceased husband or the limited interest of his widow.

The Subordinate Judge held that the absolute estate passed. He said : "The sale to the defendant being for consideration, and having been effected through the agency and with the consent of Jaikishan Das, the plaintiff's ancestor, and the plaintiff's father having also by his conduct admitted it, the plaintiff could not now say that it was confined merely to the vendor's life interest, or that it did not transfer an absolute title to the vendee. The rule of law laid down by the Privy Council in *Raja Lakhi Debi v. Gokal Chandar Chodhry* (1) is, that in order to make valid the sale by a Hindu widow of her husband's property, the consent of such of her husband's kindred, who are likely to be affected by the transactions is necessary ; and that there should be such a concurrence of the members of the family as would suffice to raise a presumption that the transaction was a fair one and justified by the Hindu law. Such consent may be proved, not only by signature or attestation of the deed, but by presence at, or knowledge of, the transaction followed by acquiescence, express or implied. All these elements are present in this case ; for, at the time the sale was made, the plaintiff had not been born, and Jaikishan Das, his ancestor, who was the only person in the family likely to be affected by the transaction, not only attested it at the time, but also expressly by his conduct acknowledged its validity afterwards, at the time the plaintiff

(1) 13 Moore's Ind. Ap. 209.

to the present suit had not been born, and his ancestor's consent being sufficient, it could not now be questioned by him, and not only the plaintiff's ancestor, but his father also acknowledged the validity of the sale by the proceedings he took on Mussummat Gomti's death."

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The High Court, on the other hand, held as follows :—

The deed of September 17, 1863, "conveyed a one-third share out of twenty biswas in mauza Begpur Kanjaula to Kewal Ram, father of the defendant Jiwan Singh. There is not a word in the sale deed which is inconsistent with the transfer being limited to the life interest of the widow-vendor. There is no expression such as is usually employed, to intimate that an absolute title was conveyed. The price paid, Rs.1500, the revenue of the share being Rs.238, would point to the conclusion that it was the widows' life interest only that was conveyed. Rs.1500 would hardly represent five years' purchase of the property. The defendant claimed that his father had bought an absolute title, and stated that the plaintiff was out of court by reason of the concurrence of his great-grandfather, Jaikishan Das, in the transfer. The issues raised were mainly, whether the defendant acquired only a life interest or an absolute right under the transaction of 1863, and whether the plaintiff was out of court by reason of Jaikishan Das's acquiescence in the transfer. There were other issues which the learned Subordinate Judge decided in favour of the plaintiff. The learned Subordinate Judge found—and his finding is not impeached in this appeal—that the transfer was made by Mussummat Gomti without any such necessity or other cause as would justify her in alienating more than her own life interest in her husband's estate. The Subordinate Judge found that she alienated it because she could not manage the property. If, then, the plaintiff is not bound by the acquiescence of his great-grandfather, and thus estopped from bringing this action, his claim is maintainable. On this issue the Court below found that the sale in question was made with the consent and acquiescence of Jaikishan Das, plaintiff's great-grandfather, who is found to have actively negotiated the sales and procured the execution and registration of the sale deed. It is found that he was



J. C. subsequently a party to a deed in which the buyer, Kewal Ram,  
 1895 hypothecated this property as security for some money which  
 he borrowed.”

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v.  
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Further on the Court found: “It is obvious that the transfer was not validated by the consent of all the persons having a right of expectancy in regard to Kashi Ram’s estate on September 17, 1863, and that the single member of the family, who helped and assisted in the making of the transfer, is not shewn by a title of evidence to have consented to any transfer beyond the life interest of the widows.”

*Cowell*, for the appellant, submitted that the deed of sale, which contained the declaration that Kewal Ram, “the vendee, has become an absolute owner of the share sold from the date of sale,” admitted of no other construction than it purported to convey the absolute estate. There was no evidence of necessity for the widow’s alienation; but the transaction was effected by Jaikishan Das, who, as the reversionary heir solely entitled if the succession had then opened, had, on the authorities, power to bind all other contingent reversioners by his consent, or at least such of them, including the plaintiff, as might derive title through him as heirs to the widow’s husband. His consent was evidenced by his execution of the deed under the mook-tarnamah, his registration of it, and his receipt for the widow of the purchase-money; and the deed on its true construction effected the transfer of the absolute estate.

[LORD HOBHOUSE. The question is not so much what is the legal construction of the deed as what must Jaikishan be deemed to have consented to. It is a very stringent equity that is sought to be enforced against him arising out of an alleged consent.]

He consented to the express terms of the deed, which were that the purchaser should become absolute owner, and which the High Court must have overlooked when it said there was no expression to that effect. Jaikishan subsequently took a mortgage of the estate from the purchaser.

[LORD HOBHOUSE. The highest Court having taken that view of the deed, it is impossible to say that Jaikishan must

necessarily have taken the opposite view, and to hold him and all other reversionary heirs bound accordingly.]

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There is evidence of subsequent conduct both against Jaikishan and Meghraj shewing that they consented to the transaction.

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The respondent did not appear.

The judgment of their Lordships was delivered by

1895

Dec. 7.

SIR RICHARD COUCH. The property in question in this appeal formerly belonged to one Sita Ram, who died leaving two sons, Baldeo Das and Jaikishan Das. Baldeo Das, the elder, died leaving a widow, Mussummat Nabbo, and an adopted son, Kashi Ram. The latter died without children, leaving a widow, Gomti, who thereupon took by inheritance the estate of a widow under the Hindu law. Nabbo, who took nothing, died in 1878, and Gomti died on March 8, 1880. Jaikishan Das had two sons, Bhabuti Ram and Kashi Ram, who was adopted by Baldeo Das. Bhabuti Ram, who survived his father, died in the lifetime of Gomti, leaving a son, Meghraj, who survived Gomti and died on May 22, 1881, leaving a son, the respondent Misri Lal. Consequently, on the death of Gomti, Meghraj became entitled as heir of Kashi Ram to possession of the property, which consisted of one-third of a mouzah called Begpur Kanjaula, pargana Koel.

On February 7, 1890, Misri Lal, then a minor, by his guardian brought a suit against the appellant Jiwan Singh, who was in possession of the property, to recover possession of it and mesne profits.

The defence in the written statement was that, after the death of Kashi Ram, Jaikishan Das sold the property to Kewal Ram for Rs.1500, and a deed of sale in respect of it was executed by Jaikishan Das on behalf of Nabbo and Gomti under his supervision, and registered by his special power of attorney dated September 17, 1863; that Gomti adopted one Ranchhore Das as her son with the consent of Jaikishan Das; that the adopted son became the possessor of the property and money left by Kashi Ram; that a dispute arose between Gomti and Ranchhore Das which was compromised by part of the



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property left by Kashi Ram being taken by Gomti, part by Ranchhore Das, and the remainder being presented to Sri Maharaj Parsotum Dasji; and that, after the death of Gomti, Meghraj brought a suit on a bond which was given to Gomti under the compromise, and did not claim the property in the possession of Ranchhore Das and Gusain Parsotam Das. There was no proof of the adoption and no evidence of any legal necessity for the sale. The defence must rest upon the effect of the deed of sale and the conduct of Jaikishan with regard to it. The deed admitted in evidence for the plaintiff purported to be made by Nabbo and Gomti and to sell one-third share of the village Beghur Kanjaula, with all the rights and interests pertaining thereto, for Rs.1500; it stated that the vendors "put the vendee in possession of the share sold instead of us like ourselves"; and that "the vendee has become an absolute owner of the share sold from the date of sale." It was signed as follows: "Mussummat Gomti, Lambardar, wife and Mussummat Nabbo, pattidar, mother of Kashi Ram, heirs of Kashi Ram, by the pen of Jaikishan Das sarbarakar and mukhtar." It is dated September 17, 1863; and there was a power of attorney of the same date from Nabbo and Gomti to Jaikishan authorizing him to execute the deed and get it registered, which he did. Gomti only had an estate in the property; Nabbo had none. If the effect of the deed was to pass only the estate which Gomti had as widow, Misri Lal would be entitled to recover possession. Upon the evidence in the suit the question appears to their Lordships to be, Was it so clear that more than Gomti's beneficial estate in the property—the estate which she might have sold if there had been a legal necessity for it—passed by the deed, that Jaikishan Das must be taken to have consented to its passing? The Subordinate Judge who dismissed the suit does not appear to have considered this question. He seems to have assumed that this estate would pass. When the case came before the High Court on appeal the two learned judges were of opinion that only the estate of the widow passed by the deed. In the judgment they say: "There is not a word in the sale deed which is inconsistent with the transfer being limited to the life interest of the widow-

ver as, There is no expression such as is usually employed, to intimate that an absolute title was conveyed . . . . the single member of the family, who helped and assisted in the making of the transfer, is not shewn by a tittle of evidence to have consented to any transfer beyond the life interest of the widows." This view of the transaction is supported by the fact that there is no evidence that Jaikishan Das received any part of the Rs.1500 or was in any way benefited by or had any inducement to concur in a sale which would destroy his right as the apparent reversionary heir. Their Lordships do not think it is necessary for them to give any opinion upon the construction of the deed. The opinion of the High Court which has been quoted is conclusive that it cannot be so clear that the whole estate passed by the deed that Jaikishan Das must be taken to have consented to its passing. The answer to the other part of the defence is that Jaikishan Das was no party to the compromise in June, 1871, and that Meghraj's claiming on the death of Gomti the share of the property which she took under it is not inconsistent with the claim in this suit, but the contrary. It was necessary for the appellant to displace the title by inheritance of Misri Lal by satisfactory proof that the whole estate, and not only the estate of Gomti as widow, was sold to Kewal Ram. He has failed to do this; and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court in favour of the respondent and dismiss the appeal.

J. C.

1895

JIWAN SINGH

v.

MISRI LAL.

Solicitors for Appellant : *T. L. Wilson & Co.*

J. C.\*

1895

Nov. 13;  
Dec. 7.

IMDAD HUSAIN . . . . . PLAINTIFF;

AND

AZIZ-UN-NISSA AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER  
OF OUDH, LUCKNOW.*Law of Limitation—Adverse Possession—Possession under Decree of Sub-  
settlement—Effect of Decree and of Possession on those interested in  
Superior Tenure.*

In a suit in 1887 to recover a village from a sub-settlement holder thereof, it appeared—

(a) That the plaintiff's ancestor had mortgaged the whole ilaka of which the village was part under the Mahomedan dynasty in 1854; and that after Lord Canning's confiscation the mortgagee obtained in 1860 a summary settlement of the ilaka, and also a talookdari sunnud of another estate which was made to include the village in suit.

(b) That thereafter the plaintiff enforced in 1884 his right to redeem, which had been restored to him by Act XIII of 1866, and obtained possession of the whole ilaka except the village in suit.

(c) That in 1866 the defendant obtained a consent decree in a sub-settlement suit against the settlement holder of 1860, under which he obtained and ever since held possession of the said village:—

*Held*, that whatever the effect of this decree upon the superior tenure, adverse possession under it bound all persons claiming interest in such tenure, and accordingly the suit was barred by limitation.

**APPEAL** from a decree of the Judicial Commissioner (July 30, 1889) affirming a decree of the District Judge of Fyzabad (July 30, 1888) dismissing the appellant's suit.

The suit was brought on January 20, 1887, to establish the invalidity as against the appellant of certain proceedings of the settlement officer on July 31, 1865.

Both Courts held that those proceedings were binding on the appellant, at all events until set aside, and that limitation ran against him either from 1866 or at least from 1878, when he had knowledge of the facts on which his title was based. They related to a village called Cheton in the Jiapur estate.

\* *Present*: LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

At the date of the mutiny this Jiapur estate was in the possession of Tafazzul Husain, having been mortgaged to him in 1854 by Hafiz Ali, the then talookdar and father of the appellant. The conditions of the mortgage were that the mortgagee should take possession and pay one-seventh of the profits to the mortgagor and his heirs, the mortgage being redeemable on payment of Rs.2000. Hafiz Ali died in 1857, leaving the appellant an infant. Tafazzul, being in possession, obtained, after the annexation and confiscation, a summary settlement from the British Government and a sunnud of talook Samanpur, which eventually included the Jiapur estate.

Various claimants sued Tafazzul for a declaration of their rights in the Jiapur estate. The appellant was one of the plaintiffs, and he, at that time ignorant of the mortgage, claimed in his suit, brought on July 12, 1865, that he was entitled to have a sub-settlement of the ilaka on the ground that he had been a sub-settlement holder before the mutiny and confiscation. His suit was dismissed on December 22, 1868.

Subsequently, in the course of other litigation, it appeared, in 1878, that there was evidence to prove that the ilaka had, as above stated, been mortgaged by Hafiz Ali to Tafazzul Husain, and that the mortgage had been satisfied and paid off by the profits of the property, so as to entitle the appellant to recover the same; and he consequently, on February 25, 1881, sued to redeem the ilaka, which suit was successful in both the first Court and in the Lower Appellate Court, and finally before the Judicial Committee on March 16, 1888 (1), which last date was after the institution of the suit out of which this appeal has arisen.

The result of this litigation was to establish that the appellant was entitled to recover the ilaka from Malik Hidayat Husain, the brother and successor of the said Tafazzul Husain.

While the ilaka was still in the possession of Hidayat Husain as talookdar of Samanpur, one Afzal Husain, represented by two of the respondents, filed his petition on November 10, 1865, in the Court of the settlement officer, making Hidayat Husain a defendant, claiming that the village of Cheton was his

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(1) *Amanat Bibi v. Imdad Husain*, L. R. 15 Ind. Ap. 106



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1895 have a sub-settlement made with him.

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In that suit a decree was made by consent on July 31, 1866, that Afzal Husain, as sub-settlement holder, should take ten annas of the profits of the village, and that the talookdar should be entitled to the remaining six annas thereof.

Under the decree and settlement Afzal Husain, and, after his death, his widow and son and the other respondents (whom they admitted as partners in the sub-settlement), continued to hold the village.

The appellant thereupon sued in 1887, setting out the decree which established his right to redeem, and alleging that the respondents were holding under a decree of the settlement officer to which he was no party, and by which he was not bound. The respondents replied that neither were they bound by the decree for redemption to which they were no parties, and pleaded that they held under the talookdar, who was solely entitled to Jiapur after Lord Canning's confiscation, inasmuch as he alone held the sunnud which had been executed in respect thereof. They also pleaded limitation. The District Judge dismissed the suit. As regards the effect of the decision of July 31, 1866, his view was that by virtue of the confiscation the plaintiff's equity of redemption was swept away, and was only restored by Act XIII. of 1866, which came into operation on March 23, 1866. Accordingly, he held that Tafazzul was absolute talookdar, subject to such proprietary rights as might be established against him, and that the effect of the decision of July 31, 1866, was to confer on the defendants' ancestor something reserved by the Government out of the talook. Therefore, that the right recognised by that decision was derived from the Government, and was a right binding on the holder of the talook for the time being, which therefore bound the plaintiff though he was not a party to the decree. As to limitation, he held that by the order of July, 1856, the defendants acquired a right which was hostile to the plaintiff, and, therefore that the statute ran from that date, or at the latest from 1873, when he became aware of his rights.

The Judicial Commissioner's judgment as to the effect of

the sub-settlement, and the status of Hidayat Husain in consequence of it, was as follows :—

“ ‘Sub-settlement’ is the term used to describe a tenure which was a creation of the British Administrators of Oudh adopted from the revenue system of the North-Western Provinces. Mr. J. G. W. Sykes, in his Compendium of Oudh Talukdari Law, describes it as ‘an under-proprietary right in a village, hamlet or chak subject to a rent proportional to the Government revenue or to the profits, being variable and to be determined under the sub-settlement Act XXVI. of 1866.’

“ In explanation of this it is instructive to refer to the Directions for Settlement Officers, a standard work of authority, compiled under the orders of the Lieutenant-Governor, North-Western Provinces, and republished in 1858.

“ ‘Paragraph 110. It being decided that there are in one village or in any number of villages two separate properties of different kinds, it is open to the Government to form a settlement either with the superior or the inferior party. If the former, the inferior proprietor must be protected by a sub-settlement. If the latter, the right of the superior must be compensated by a money allowance in lieu of his share of the profits.’

“ ‘Paragraph 111. If the settlement be made with the superior proprietor, he must be allowed a sum equal to his share of the profits of the estate and such as will cover the cost and risk of collection, and the sub-settlement will be formed with the inferior proprietor at an amount so much in excess of the Government demand. This sum should never be less than 10 per cent. upon the Government demand for profits and 5 per cent. for expenses of collection, but where the estate is small it may be more.

“ ‘Paragraph 112. The inferior owners are thenceforward bound to pay their revenue to their superior according to fixed instalments which should be regulated so as to be a month in advance of the Government instalment.’

“ This description of sub-settlement clearly shews that it is a proprietorial right altogether independent of the superior lord, and recognised by Government fully as distinctly as that of the

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talookdar himself. I am altogether at a loss to understand how any one familiar with the tenures of this part of India could for a moment contend that sub-proprietors of this description derive their title from the over-lord. In by far the great majority the direct reverse was the fact, the inferior proprietors being the ancient and hereditary proprietors, while the over-lord's connection with the estate was often a matter of very recent origin, and due to the fact that the sub-proprietor in the troublous times of the last eighty years prior to British rule put themselves under the ægis of some powerful lord possessing an estate in their vicinity. And so when the British Government, after the general confiscation of all landed property in Oudh, reconferred their estate upon the talookdars, it was on the distinct condition that the interests of the under-proprietors were distinctly reserved from the grant. See the letters of Government, dated October 10, 1859, and October 19, 1859, printed in the first schedule to Act I. of 1869, and especially paragraph 4 of the second letter, which clearly assert the independent character of the inferior holding, and the direct action of Government in dealing with the inferior proprietor as well as with the superior proprietor.

“No doubt it was the practice of the Settlement Courts in Oudh usually to array the talookdar as defendant against any claimant for sub-settlement or other under-proprietary right, and it was a convenient practice so to do. But this is a very different thing from saying that a sub-proprietary tenure, especially when of the nature of a sub-settlement, was an estate carved out of the talooka, and that a suit for sub-settlement therefore was in the nature of a suit for ejectment against the superior lord. It was plainly nothing of the sort, but was a claim upon Government to ratify the claimant's title by the formality of a decree. The talookdar, no doubt, had a right to be heard on the matter, but rather, as the lower Court puts it, as an objector than as a defendant properly so called.

“In the present instance, I think, it is clear that the sub-proprietary tenure confirmed by the decree of July 31, 1866, was a sub-settlement to all intents and purposes.



"Then what was the status of Malik Hidayat Husain on July 31, 1866 ?

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"It is clear that on that date he was the de facto talookdar. His brother, Tafazzul Husain, whom he succeeded, was in possession of the estate at annexation and during the mutiny, and was summarily settled with by Government, and again in 1860 obtained the talookdari and a regular sanad therefor, which, however, as usual, strictly reserved all rights of under-proprietors to them and their heirs.

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"Again, until the passing of Act XIII. of 1866, i.e., till March 23, 1866, there was no law in Oudh to enable the mortgagors of mortgaged talookas to redeem their property. So that in 1865, when respondents brought their present suit, Malik Hidayat Husain was the de facto talookdar, and to all outward seeming was possessed of an unassailable title as absolute proprietor."

He further held that the possession of the defendant-respondents was adverse to plaintiff ever since July 31, 1866, for the plaintiff might have claimed possession then; and if it be answered that he could not have claimed possession then owing to his own ignorance of his rights as superior proprietor, such ignorance was his misfortune, but does not seem under the law to extend the period of his limitation.

Also that plaintiff's right to sue did not first accrue on the redemption of his mortgage. The respondents are not assignees of Malik Hidayat Husain, but persons holding on an independent title founded on a decree by a Government officer, which decree was good against all the world until properly set aside by a competent Court, and plaintiff's right to sue accrued on July 31, 1866. But even if we should hold that plaintiff's right to sue to set aside the settlement decree first accrued to him in 1877-8, when the facts entitling him to sue first came to his knowledge (vide articles 91 and 120, Sched. II., Act XV. of 1877), plaintiff is still time-barred, for the longest limitation provided by these articles is six years, and this suit was not brought till January, 1887.

Mayne, for the appellant, contended that this judgment was

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based on an entire misconception of the effect of the Order of July 31, 1866. The plaintiff in that case claimed against a man whose real position was that of mortgagee of the estate. The only sub-proprietary right so obtained by the decree was that of sub-mortgagee, created by the act of Hidayat Husain. The litigation proceeded distinctly on that footing and on no other. That relationship of mortgagee and sub-mortgagee had been created solely by the act of Hidayat, and his right to create it arose from the fact that Tafazzul had obtained the land on mortgage from Hafiz Ali in 1854. The holder of Tafazzul's mortgage had a perfect right to create a sub-mortgage, which was no more adverse to Hafiz Ali than the principal mortgage was. In July, 1866, Afzal Husain claimed nothing, and the Court awarded him nothing which was inconsistent with the rights of Hafiz Ali or the Appellant. The appellant could not have sued to set aside the decree, because it was valid and binding between the parties to it, and did not prejudice any one else. As soon as he had redeemed the mortgage of 1854 the sub-mortgage came to an end, and with it the decree affirming it, and then for the first time the respondents' possession became adverse. Accordingly it was contended that the Court ought to have held that the respondents never had any title except as sub-mortgagees under the appellant as mortgagee; that this sub-mortgage lapsed on the redemption of the principal mortgage; that the appellant's claim was not barred by limitation inasmuch as during the continuance of the mortgage the respondents' holding was derivatively under the appellant and not adverse to him.

*Branson*, for the respondents, was not heard.

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Dec. 7.  

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The judgments of their Lordships was delivered by

LORD HOBHOUSE. The object of the suit, in which the appellant is plaintiff, is to recover a village called Cheton, which the defendants hold in possession. The history of the plaintiff's dealings with the property is long and complicated, but the facts material to the decision of the present question may be concisely stated.

In the year 1854, when the Mahomedan dynasty was still in

power one Hafiz Ali was owner of the ilaka of Jiapur, which comprised the village of Cheton. He made an usufructuary mortgage of the ilaka to Tafazzul Husain to secure Rs.2000. Tafazzul was thus in possession of the ilaka, and so remained during the annexation and the confiscation and the subsequent restoration of proprietors. In the year 1860 summary settlement was made with him, and a sunnud granted to him as talookdar of Samanpur, in which village Cheton was then included.

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Hafiz Ali died in or about 1857, leaving the plaintiff his son and heir. It seems a strange thing, but it is proved, that the mortgage of 1854 so passed out of the knowledge of the parties interested, that the plaintiff spent some years over three separate law-suits, in which, treating Tafazzul or his heir as proprietor, he attempted to establish sub-proprietary rights against him. All these attempts were defeated. Then the mortgage of 1854 turned up; and in the year 1881 the plaintiff sued for redemption of the whole ilaka, which was decreed in his favour by the Judicial Commissioner in 1884. That decree was confirmed on appeal by Her Majesty in Council in 1888.

Under that decree the plaintiff appears to have possessed himself of the ilaka excepting the village of Cheton, which the defendants claim to retain by a title valid against both Tafazzul's heir and the plaintiff.

In November, 1865, one Afzal Husain filed a plaint against Hidayat Husain, the heir of Tafazzul, alleging that Cheton was his hereditary zemindary, and claiming to have the settlement made in his name. On July 31, 1866, an agreement for compromise was signed by the agent of Hidayat and by Afzal, who is therein described as sub-settlement holder of Cheton. On the same day a decree was passed in the following terms :—

“The claim of the plaintiff (Case II.) is admitted by the defendant, and an agreement is filed under which it is arranged that, after payment of the Government demand and setting aside 10 per cent. therein on account of the Patwari and Chaukidar, whatever remains of the gross rental assumed by the assessing officer is to be divided in the proportion of 6 annas to defendant and 10 annas to plaintiff.



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“ Case II.—Decreed by consent as against defendant and the agreement as to profits is confirmed.”

It is not disputed that sub-settlement was made with Afzal, or that he and his successors have held possession ever since in accordance with the decree. The position of the parties then was this. By the confiscation of 1858 all rights were swept away, whether Tafazzul's proprietary rights in possession, or the plaintiff's right to redeem, or Afzal's sub-proprietary rights. Sub-proprietary rights were restored by the orders of October 1859. The right of redemption was restored by Act XIII. of 1866, which was passed in March of that year. At the date of Afzal's suit Hidayat was the only person who could represent the proprietary interest as against a person claiming to be sub-proprietor. At the date of Afzal's decree, the plaintiff had a legal right to redeem the ilaka of Jiapur, but it was wholly unknown to him, and apparently to everybody else, and he was then prosecuting claims of a different nature—claims as clearly adverse to the proprietary right as were those of Afzal.

The plaint in this suit was filed in January, 1887, after the plaintiff's right to redeem Jiapur was established by the Judicial Commissioner, but before his decree was affirmed by Her Majesty in Council. Documents were filed and issues settled, but nothing further was done till after Her Majesty's decree. Then the District Judge considered it expedient not to take further evidence until it was settled whether or no the suit was barred by lapse of time. The case was heard with reference to that question on the documents and undisputed facts; and the District Judge decided against the plaintiff and dismissed the suit. In discussing the case he came also to the conclusion that the decree of 1866 was binding on the plaintiff.

The plaintiff appealed to the Judicial Commissioner. Among other grounds of complaint was the ground that the District Judge, while professing to decide the suit on the question of limitation, had in effect, without taking full evidence, decided another issue, namely, that the plaintiff was bound by the decree of 1866. The Judicial Commissioner, finding that the record sufficed for deciding the point of limitation, overruled the plaintiff's objection, which has not been renewed here; and

he confined his decision to the one point of limitation. His opinion is that the decree of 1866 established Afzal as the owner of a sub-proprietary right; that he thereby became entitled either to a settlement or a sub-settlement; that such a position is and must be adverse to any one claiming to be talookdar or superior proprietor of the same estate; and that possession taken in virtue thereof is a possession adverse to all the world. Therefore, as the defendant's possession dates back to 1866 at latest, and as the suit was not brought till 1887, the lapse of time is fatal to it.

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It was urged in the Court below that the decree of 1866 was made by collusion between Afzal and Hidayat. But the plaint makes no such charge: no issue was framed upon it; the District Judge does not mention it; and the Judicial Commissioner rightly refused to take it into consideration.

The only new argument presented to their Lordships by Mr. Mayne is founded on the heading of the decree of 1866, which is, "Claim, Sub-proprietary title as mortgagee." Thereupon it is argued that Afzal took with an admission that he was mortgagee only. That is at best a slight ground for the desired conclusion. It is not easy to explain the heading; but it cannot refer to the mortgage by Hafiz Ali to Tafazzul, because that was unknown to the parties till more than ten years later. And it is quite inconsistent with the claim made by Afzal in his plaint, and with the solehnama or deed of compromise on which the decree is founded.

There is in fact no answer to the reasoning of the Judicial Commissioner. It is not necessary to discuss what would have been the plaintiff's position as against Afzal if he had known his rights against Hidayat during the suit of 1865-66 and had intervened then or immediately after the decree. Time has run against him, and his appeal must be dismissed with costs. Their Lordships will humbly advise Her Majesty in accordance with this opinion.

Solicitors for appellant : *Young, Jackson, Beard & King.*

Solicitors for respondents : *Barrow & Rogers.*

J. C.\*  
 1895  
 Nov. 12  
 1896  
 Feb. 22.

NORENDRA NATH SIRCAR AND ANOTHER. PLAINTIFFS;  
 AND  
 KAMALBASINI DASI . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Indian Succession Act (X. of 1865), s. 111—Construction of Code—Hindu Will—Executory Gift over.*

A code must be construed according to the natural meaning of the language used, and not on the presumption that it was intended to leave the existing law unaltered.

Lord Herschell's opinion on this point in *Bank of England v. Vagliano* ([1891] A. C. 107) approved.

By the will of a Hindu who left one major and two minor sons, the eldest was appointed executor and manager during minority, and it was directed "my three sons shall be entitled to enjoy all the moveable and immoveable properties left by me equally. Any one of the sons dying sonless, the surviving sons shall be entitled to all the properties equally" :-

*Held*, that the period of distribution being the death of the testator, the gift to the three sons was indefeasible at that date, according to the true construction of s. 111 of Act X. of 1865, made applicable by the Hindu Wills Act of 1870; and that the widow of the eldest son who died sonless after the testator's death succeeded to his share, the executory gift over not taking effect.

APPEAL from a decree of the High Court (Aug. 30, 1892) which partly reversed a decree of the First Subordinate Judge of the 24 Pergunnahs (Oct. 7, 1890).

On September 9, 1889, the appellants, being the two minor surviving sons of the testator Hara Nath under the guardianship of their mother, sued the respondent Kamalbasini, the widow of the testator's eldest son Jogendra Nath, who had died on December 2, 1886, to recover the one-third share of Hara Nath's estate which had under his will devolved upon Jogendra Nath with other relief. By her written statement the respondent claimed to succeed thereto as his sonless widow and heiress.

The question decided in appeal was, whether the bequest contained in the clause of the will set out in their Lordships'

\* *Present* : LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.



judgment of property to three sons conferred upon each an absolute title, or whether the share of each on his death without male issue passed over to the surviving sons. The decision turned upon the true construction and effect of s. 111 of the Indian Succession Act, 1865, made applicable to Hindu wills by the Hindu Wills Act of 1870.

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The Subordinate Judge, after examining the case of *Soorjeemonee Dossee v. Denobundoo Mullick* (1), in which the Judicial Committee had held that there was not "anything generally mischievous, or against the principles of Hindu law in allowing a testator to give property, whether by way of remainder or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen, if at all, immediately on the close of a life in being," and had consequently supported a clause in the will then in question, under which the share of a son who died sonless passed to the surviving sons, and not to the widow of the deceased son, and also a number of English decisions to the same effect, arrived at the conclusion that, according to both Indian law, down to the passing of the "Hindu Wills Act, 1870," and to English law, on the death of Jogendra Nath without a son, whether before or after his father's death, the gift over would have taken effect, and Jogendra Nath's share of the estate would have vested in these appellants.

So far the High Court concurred with the First Court.

The Subordinate Judge then considered whether the decision in the appeal of *Soorjeemonee Dossee* was still law in India, or had been set aside by the 111th section of the Indian Succession Act and illustration (b); and he arrived, "not without much hesitation," at the conclusion that it was not the intention of the Legislature, by that Act, to depart from the law of England, or to affect the authority of that decision; and he accordingly held "that the executory devise contained in Hara Nath's will was good and valid, and must have effect given to it, and that these appellants were entitled to the share of Jogendra Nath on his death without leaving a male child."

Upon the question of the effect to be given to the Act in

(1) 9 Moore's Ind. Ap. Ca. 123, 135, 136.



J. C. question, the judgment of the Subordinate Judge was as  
1896 follows :—

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The question is, has the Indian Succession Act made any change in the law on the subject ?

The defendant's contention is that it has ; and that the case of Soorjeemonee Dossee is no longer authority on the point.

Her pleader refers to ss. 111 and 118 of the Indian Succession Act, and relies especially on illustration (b) of the former section. This illustration certainly supports that contention.

Sect. 111 deals with contingent bequests ; but s. 118 deals with bequests over, that is to say, with bequests like the present.

Sect. 118 says, that in each case the ulterior bequest is subject to the rules contained in ss. 107 to 114, and 116 and 117.

Sect. 111 is one of the sections, therefore, to which an ulterior bequest is subject.

Illustration (b) of that section is in these words : " A legacy is bequeathed to A., and in case of his death without children to B. If A. survives the testator or dies in his lifetime leaving a child, the legacy to B. does not take effect."

In Mr. Whitley Stokes' edition of the Indian Succession Act, the case of *Edwards v. Edwards* (1) is quoted under the above illustration. This illustration is in accordance with the second rule laid down in *Edwards v. Edwards* (1) so far as A.'s dying in the lifetime of the testator leaving a child is concerned. But so far as A.'s surviving the testator is concerned, the illustration is directly in opposition to the rule laid down in that case.

Illustration (a) is in accordance with the fourth rule in *Edwards v. Edwards* (1) (now repealed by the House of Lords in *O'Mahoney v. Burdett*.) (2)

This shews that the framers of the Act did not intend to lay down the law in opposition to the rule of English law prevalent at the time.

The defendant's pleader has quoted Henderson on Wills. There is nothing in that book, however, to shew that the rules laid down in ss. 111 and 118 of the Act are in opposition to the

(1) 15 Beav. 357.

(2) L. R. 7 H. L. 388.

rules of construction that were in force when the Indian Succession Act was passed.

There is no presumption therefrom of the law prevailing in England in 1865 having been departed from by the Legislature on this subject by the Indian Succession Act of 1865.

Sect. 111 says that the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable.

There is nothing in this section to shew that the period of distribution would necessarily be the time of the testator's death. In fact, there are many cases where the period of distribution may happen after the death of the testator [as illustration (a)].

In illustration (a), under s. 112, the period of distribution is the testator's death, as in *Cripps v. Wolcott*. (1) In illustration (b), under s. 112, the period of division is the death of the tenant for life.

In the case of *Kumar Tarakeswar Roy v. Kumar Shikhareswar* (2), and in that of *Kristoromoni Dossee v. Norendro Krishna Bahadoor* (3), the case of *Soorjeemonee Dossee* was referred to and discussed, but was not dissented from, and it would seem was followed.

Probably the period of distribution would be, in a case like the present, the death of the first taker. The period of distribution would not be the time of the testator's death. Illustration (b) probably goes beyond the section, and has not the same force as the enacting part of the section.

I think, though not without much hesitation, that the case of *Soorjeemonee Dossee* is still the law of the land, and that *Jogendra Nath*, by simply surviving the testator, did not take an absolute indefeasible interest in the one-third share of *Hara Nath's* property.

It was tried to be shewn that what the testator had in mind was the death of one of his infant sons, who was at the time very ill. The evidence on the point of his dangerous illness is not satisfactory. And I do not think that the defeasible clause had reference to the share of that son only.

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(1) 4 Mad. 15. (2) L. R. 10 Ind. Ap. 51 ; S.C. Ind. L. R. 9 Calc. 952.

(3) L. R. 16 Ind. Ap. 29 ; S.C. Ind. L. R. 16 Calc. 883.

J. C. It is next argued, on behalf of the defendant, that the bequest  
1896 over is illegal and void.

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The argument is, that the testator's intention was to exclude female heirs, and that this was an attempt to create a new line of descent which the law would not permit, and that in consequence the bequest over would fail as opposed to Hindu law. The case of Soorjeemonee Dossee shews that such a bequest is not opposed to Hindu law, and the case of Kristoromoni, cited above, shews that this view of Soorjeemonee Dossee's case was not even then dissented from. The bequest over is not open to the objections that would, on the authority of the Tagore case, make the gift over void.

The executory devise is therefore good and valid, and must have effect given to it. The plaintiffs would be entitled to the one-third share of Jogendra Nath on his death without leaving a male child.

The judgment of the High Court (Petheram C. J., and Macpherson J.) on this point was as follows:—

The legacy which is to take effect on the happening of the uncertain event is the gift to the survivors; and the section, if applicable to immoveable property, enacts, in so many words, that unless the uncertain event happens before the fund is payable—i.e., in this case before the death of the testator—the legacy—i.e., the legacy to the survivors—shall not take effect. In our opinion, then, as Jogendra Nath survived his father, a legacy to his surviving brothers in the event of his death without male issue would not take effect; and it follows that his widow, the defendant, is, as his heiress, entitled to his one-third share of his father's estate.

On this part of the case we should add that, even if this were not the case, we are not by any means prepared to say that the intention of Hara Nath was to do anything more than to provide that the estate should be managed by Jogendra, leaving it to devolve according to the provisions of Hindu law.

*Crackanthorpe, Q.C., Doyne, and Sir W. Rattigan*, for the appellants, contended that the decision of the High Court was wrong. It was clear, on the language of the will, that the testator's intention, which was expressed on the day of his



death, was that the share of any son dying at any time thereafter sonless should pass to his brothers. Reference was made to *Soorjeemonee Dossee v. Denobundoo Mullick* (1); *Edwards v. Edwards* (2), and the three rules of construction there laid down; *Farthing v. Allen* (3); *Smith v. Stewart* (4); *O'Mahoney v. Burdett* (5); *Ingram v. Soutten*. (6) There was no ground for the doubt thrown out by the High Court as to it being the testator's intention to do nothing more than to provide that the estate should be managed by Jogendra Nath, leaving it to devolve according to the rules of Hindu law. Further, there was no ground for supposing that the Indian Legislature intended to repeal the law as to executory devises laid down in 9th Moore, and to deprive a Hindu testator of the power which, previously to the Hindu Wills Act making certain sections of the Succession Act applicable to him, he had enjoyed of directing that his estate should devolve in manner prescribed by this will. It was contended that s. 111 of the Act of 1865 and illustration (b) did not apply to this will having regard to its manifest intention or to the facts of this case; and ss. 61, 78, and 106 were referred to in reference to the question of construction. The estate was not distributable during the minority of any of the beneficiaries, or at least till the death of one of them.

*Mayne* for the respondent, contended that the judgment of the High Court was right. According to the true construction of the clause, having regard to s. 111 of the Act of 1865, each of the three sons took an absolute estate unless, before the period of distribution, he died sonless. His dying sonless was the specified uncertain event contemplated by the section. No time is mentioned in the will for the occurrence of that event. Consequently, if the gift over is to take effect, that uncertain event must happen before the fund is distributable, or, in this case, as the estate is immoveable, before the three shares vest in the several sons. The period of vesting is the date of the testator's death. To make the gift over operative, Jogendra

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(1) 9 Moore's Ind. Ap. Ca. 123.

(2) 15 Beav. 357.

(3) 2 Madd. 310.

(4) 4 De G. &amp; Sm. 253.

(5) L. R. 7 H. L. 388, 393.

(6) L. R. 7 H. L. 408.

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 Nath should be shewn to have died sonless before the testator died. There is no foundation in this will for saying that the date to be regarded is the death of the first or other son or the termination of minority. The object of the testator was to accelerate rather than postpone the date of vesting. The shares having vested, the testator was anxious to provide for their management and preservation. Reference was made to *Edwards v. Edwards* (1), which lays down principles rather than rules; *Bowers v. Bowers* (2); *Olivant v. Wright* (3); *Besant v. Cox* (4); *Ellokasse Dossee v. Durponarain Bysack*. (5)

*Crackanthorpe, Q.C.*, replied, citing *Koylashchunder Ghose v. Sonatun Chung Barooie* (6) and *Nanak Ram v. Mehin Lal* (7) as to the force to be allowed to illustrations in an Act. See also *Raikishori Dasi v. Debendranath Sircar* (8) and *Rai Bishen Chand v. Mussumat Asmaida Koer*. (9)

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 The judgment of their Lordships was delivered by  
 LORD MACNAGHTEN. In this case there is a question as to the effect of the will of Hara Nath, a Hindu gentleman who died on January 14, 1882. Hara Nath left three sons. The eldest, Jogendra Nath, had attained majority at the time of his father's death. The other two who were children by a junior wife were then infants of tender age.

The will, which was made on the day on which the testator died, disposed of his property in the following manner :—

“ My three sons shall be entitled to enjoy all the moveable and immoveable properties left by me equally. Any one of the sons dying sonless the surviving sons shall be entitled to all the properties equally.”

Jogendra Nath was appointed sole executor with powers of management during the minority of his brothers. On their attaining majority he was directed to “ make over charge of their properties to them.”

Jogendra Nath proved the will and took upon himself the

(1) 15 Beav. 357.

(2) L. R. 5 Ch. 244.

(3) 1 Ch. D. 346.

(4) 6 Ch. D. 604.

(5) Ind. L. R. 5 Calc. 59.

(6) Ind. L. R. 7 Calc. 132.

(7) Ind. L. R. 1 All. 487, 495.

(8) L.R. 15 Ind. Ap. 37, 44, 46.

(9) L. R. 11 Ind. Ap. 164.



management of the testator's estate. He died on December 2, 1866. He left a widow, but died sonless.

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In these circumstances a contest arose as to the destination of Jogendra Nath's share. The surviving sons of Hara Nath by their mother and next friend claimed it as theirs under the terms of the will. On the other hand Jogendra's widow, as his heir, contended that on the testator's death the executory gift over in the event of any of his sons dying sonless became incapable of taking effect having regard to the provisions of s. 111 of the Indian Succession Act, 1865, which was made applicable to the wills of Hindus by the Hindu Wills Act, 1870.

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Sect. 111 of the Act of 1865 enacts that "where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event the legacy cannot take effect unless such event happen before the period when the fund bequeathed is payable or distributable." In the illustrations to that section the following case is given :—

"(b) A legacy is bequeathed to A., and in case of his death without children to B. If A. survives the testator or dies in his lifetime leaving a child, the legacy to B. does not take effect."

The Subordinate Judge referred to several text writers, and cited a number of authorities to prove that, according to the law still in force in England, and according to the law as administered in India before the date of the Indian Succession Act, 1865, an executory gift such as that contained in the testator's will would have effect in the event of the first taker dying sonless at any time. Then, turning to the Act, he held with some hesitation that it was not the intention of the Legislature to alter the law in India by departing from the law of England. The learned Judges of the High Court on appeal reversed the decision of the Subordinate Judge. They held that the Act of 1865 had altered the law, and that, according to s. 111 of that Act, as explained by illustration (b) the original gift to the three sons in equal shares became indefeasible on the testator's death.

It is hardly necessary for their Lordships to do more than express their concurrence with the judgment of the High Court,

J. C. But they think it may be useful to refer to some observations  
 1896 in a recent case before the House of Lords as to the proper  
 mode of dealing with an Act intended to codify a particular  
 branch of the law. "I think," said Lord Herschell, in *Bank*  
 NORENDRA *v. of England v. Vagliano* (1), "the proper course is in the first  
 NATH SIRCAR instance to examine the language of the statute and to ask  
 KAMALBASINI what is its natural meaning uninfluenced by any considerations  
 DASI. derived from the previous state of the law, and not to start  
 with inquiring how the law previously stood, and then, assuming  
 that it was probably intended to leave it unaltered, to see if the  
 words of the enactment will bear an interpretation in conformity  
 with this view. If a statute, intended to embody in a code a  
 particular branch of the law, is to be treated in this fashion, it  
 appears to me that its utility will be almost entirely destroyed,  
 and the very object with which it was enacted will be frustrated.  
 The purpose of such a statute surely was that on any point  
 specifically dealt with by it the law should be ascertained by  
 interpreting the language used instead of, as before, roaming  
 over a vast number of authorities in order to discover what the  
 law was, extracting it by a minute critical examination of the  
 prior decisions. . . . .

The learned Judges of the High Court have taken the line which was approved in the House of Lords. The Subordinate Judge followed exactly the opposite course. His judgment, with much display of learning and research, is a good example of the practice which Lord Herschell condemns and the mischief which the Indian Succession Act, 1865, seems designed to prevent. To construe one will by reference to expressions of more or less doubtful import to be found in other wills is for the most part an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To extend it to India would hardly be desirable. To search and sift the heaps of cases on wills which cumber our English Law Reports, in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, seems almost absurd. In the Subordinate Courts of India such a

(1) [1891] A. C. 107.

... if permitted, would encourage litigation and lead to idle and endless arguments. The Indian Legislature may well have thought it better in certain cases to exclude all controversy by positive enactment. At any rate, in regard to contingent or executory bequests, the Indian Succession Act, 1865, has laid down a hard and fast rule which must be applied wherever it is applicable without speculating on the intention of the testator.

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Two points were urged by the learned counsel for the appellants which do not seem to have been argued in the courts below. In the first place it was suggested that in s. 111 of the Act of 1865 the qualification or proviso "unless a contrary intention appears by the will" is to be understood. In some sections of the Act those words are to be found. Full effect must be given to them where they occur. But where the qualification is not expressed there is surely no reason for implying it. The introduction of such a qualification into s. 111 would make the enactment almost nugatory. Then it was argued that in the present case the fund is not "payable or distributable" within the meaning of the enactment until the testator's younger sons attain their majority. But in their Lordships' opinion that is not the effect of the will. The period of distribution is the death of the testator. It would be impossible to hold that that period is to be postponed by reason of the personal incapacity of the some beneficiaries.

The view of the High Court that s. 111 applies to bequests of all descriptions of property, there being no difference in India between real and personal property, was not impugned in the argument before their Lordships.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants : *J. L. Wilson & Co.*

Solicitors for respondent : *Barrow & Rogers.*



J. C.\*  
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 —  
 Nov. 14.  
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MATHUSRI UMAMBA BOYI SAIBA AND } APPELLANTS;  
 OTHERS . . . . . }

AND

MATHUSRI DEEPAMBA BOYI SAIBA } RESPONDENTS.  
 AND OTHERS. . . . . }

ON APPEAL FROM THE HIGH COURT AT MADRAS.

*Practice—Decree appointing Receiver for a Fixed Period—Discretion of the Court as to Discharge of Receiver.*

Where a judgment of the High Court in removing the senior widow of a deceased Rajah from the managership of his estate declared that the same should remain under the control of a receiver appointed from time to time by the Court :—

*Held*, that after the death of the senior widow the junior widows were not entitled to have the decree amended so far as it declared the permanent appointment of a receiver necessary and directed fresh appointments to be made as occasion might require during the lives of the widows. The decree did not in that respect go beyond the terms of the judgment. And the Court could discharge the receiver and place the senior surviving widow in control of the estate if satisfied that such course would be in the interests of all concerned.

APPEAL from an order of the High Court (Aug. 28, 1893) rejecting an application to amend a former decree of the same Court.

The Rajah of Tanjore died in 1855, sonless, leaving a large estate and fifteen widows. In 1862 the Government ordered that the estate, which they had, after the decree in *Secretary of State in Council of India v. Kamachee Boye Sahaba* (1), allotted for the benefit of the Rajah's family, should "be made over to the senior widow, who will have the management and control of the property, and provide in a suitable manner for the participative enjoyment of the estate in question by the other widows her co-heirs; on the death of the last surviving

\* *Present* : LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.



widow, the daughter of the late Rajah, or failing her, his next heirs if any will inherit the property."

In 1867 the Civil Judge of Tanjore on the suit (1) of two of the junior widows (one of them being the next in order of seniority) appointed a receiver, on the ground that the first defendant, the senior widow, was "wholly unfitted to be entrusted any longer with its management."

The judgment of the High Court in appeal, passed in 1868, stated as follows :--

"It appears to us to be absolutely necessary that the estate should remain in the custody and under the control and direction of a competent receiver and manager, appointed from time to time by the Civil Court, and invested with general powers for the management and regulation of the property and its enjoyment and the application of the rents and profits. The collector is at present the appointed receiver and there is no doubt that it is of the very greatest advantage to the estate and the parties interested that he should continue to act as receiver and manager, as we trust he will be able to do. The continuance of his appointment therefore will be decreed, but should it be necessary, the Civil Judge must appoint a fit and proper person in the collector's place, taking sufficient security for the discharge of his duties, and fixing a fair and reasonable amount of remuneration for his services."

The decree, founded on this judgment, contained the following declaration :—

"And this Court doth also adjudge and declare that the first defendant is not a fit and proper person to be again entrusted with the possession and management of the said property, and that the permanent appointment of a receiver and manager of the whole of the property is necessary ; and this Court doth decree and order that, if practicable, the collector be continued as such receiver and manager, but if not practicable, that the Civil Court do appoint a fit and proper person in his place, taking good and sufficient security for the discharge of his duties and fixing a fair and reasonable sum as a remuneration for his services, and from time to time make fresh appointments

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DEEPAMBA  
BOYI SAIBA.

(1) *Jijoyi Amba Bayi Saiba v. Kamakshi Bayi Saiba* (3 Madr. H. C. 424).

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—

as occasion may require during the lives of the said widows, and the survivors or survivor of them, or until it shall be considered by the Civil Court that a receiver and manager is no longer necessary."

In 1888 a petition was filed by some of the widows, including Mathusri Jijayi Amba, the next in seniority, for the discharge of the receiver and to have the management of the estate declared to belong to the widows in succession according to the seniority. This petition was rejected, and the rejection was upheld in 1890 by the Privy Council. (1)

Kamakshi Boyi, the senior widow, died in 1892, and thereafter in 1893 six out of the eight then surviving widows filed a petition in the High Court praying that the decree of 1868 might be brought into conformity with the judgment on which it was founded by deleting the word "permanent" before the words "appointment of a receiver" and by substituting the words "life of the first defendant" for "lives of the said widows and the survivor of them, or until it shall be considered by the Civil Court that a receiver and manager is no longer necessary."

The order appealed from was then made rejecting the application, the High Court referring to their order of 1888, confirmed in 1890 by the Privy Council.

*Mayne*, for the appellants, contended that the proceedings in 1888-90 had no bearing on the present application, inasmuch as the Rani who had been pronounced wholly unfitted for the management was then alive. The order of 1888 had not dealt with the question whether the appointment of the receiver should be continued indefinitely. Neither then nor in the suit in which the decree sought to be amended was passed had the question of the permanence of the receivership after the rights of the junior widows had accrued been disposed of. The Court could not as a question of jurisdiction deal with the future claims of those persons as to whose rights no demand had been made and no issue had been raised. The decree directing fresh appointments to be made from time to time had established a permanent continuance of the receivership so long as any widow

(1) *Ex parte Rani Mathusri Jijai Amba* (Ind. L. R. 13 Mad. 390).

survived, and it was contended that in so doing it was not warranted by and went beyond the terms of the judgment, thereby altering the terms of the Government grant of 1862 to the manifest injury of the widows entitled to take in succession to the senior one. Sect. 206 (Act XIV. of 1882) directs that the decree must agree with the judgment ; otherwise that the Court of its own motion or on that of any of the parties amend it. It was contended that such amendment could be made at any time under the existing Code although it was not in force at the time the decree was made.

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The respondents did not appear.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Their Lordships are of opinion that there is no ground for this application, and that the appeal fails. They think that the decree of May 8, 1868, is in accordance with the judgment pronounced and with the practice of the Court. The judgment of the Court declares that the matter for their consideration was "the future preservation and management of the whole property with a view to the interests of all parties" : the portion of the decree which is objected to was in the opinion of their Lordships necessary for the security and preservation of the property. There is nothing in the decree to prevent the appellants, if they think fit, applying for the discharge of the receiver and manager, and there is nothing to prevent the Court putting the senior widow living in the management of the property if the Court is satisfied that she is a fit and proper person to manage it on behalf of all the persons interested.

Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal.

Solicitors for Appellants : *Lawford, Waterhouse & Lawford.*



J. C.\* SRI RAJAH PAPAMMA RAO BAHADUR DEFENDANT;

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AND

Eeb. 12, 22.

SRI VIRA PRATAPA KORKONDA, H. V. } PLAINTIFFS.  
RAMACHANDRA RAZU, AND ANOTHER }

ON APPEAL FROM THE HIGH COURT AT MADRAS.

*Mortgagor and Mortgagee—Simple mortgage—Decree for Possession—  
Construction.*

Where under decree upon a "simple mortgage" a mortgagee obtained possession of the mortgaged property instead of a judicial sale:—

*Held*, that such decree did not import foreclosure. The possession obtained thereunder was as mortgagee and involved liability to account and to be redeemed.

APPEAL from a decree of the High Court (February 21, 1893), reversing a decree of the Subordinate Judge of Ellore (September 5, 1891), which dismissed the respondents' suit.

On July 15, 1870, certain persons executed a mortgage deed to the ancestor of the first and second defendants, whereby they undertook to repay a sum of Rs.2011, with interest, by four annual instalments, as security for which they mortgaged the village of Khandrika Sitaramavaram. The condition of the bond was as follows: "If the debt is not discharged according to the instalments, you should recover the same by means of the mortgaged property, the crops of our cultivation, and our other property, and from our person, according to your wish." This bond was specially registered.

In 1876 the mortgagee sued the mortgagors upon this bond, and prayed for a decree directing the defendants to pay the amount then due with subsequent interest, "by means of the undermentioned mortgage property and other property."

The District Judge of Godaveri decreed in favour of the plaintiff. The ninth paragraph of his judgment was as follows:—"In accordance with the custom prevailing in the

\* *Present*: LORD WATSON, LORD HOBHOUSE, LORD SHAND, LORD DAVEY, and SIR RICHARD COUCH.



Courts in this Presidency, three months' time will be allowed to the defendants within which to pay up the whole sum now decreed, principal and interest and costs, failing which the plaintiff shall be put in possession of the immoveable and moveable property specified in the bond sued upon and in the plaint and schedule as provided in the terms of the bond."

The decree was in the same terms.

On September 18, 1879, the mortgagors applied for a review of the above decree, on the ground that the same was not warranted by the terms of the bond and plaint, alleging that the Judge had wrongly treated the bond as one of conditional sale, and that they had remained in ignorance of the terms of the decree until application was made for execution.

On November 10, 1879, the petition for review was rejected as being out of time, and on November 21 the Court made the following order: "According to the decree the plaintiff will be put in possession of the village."

In 1883 the mortgagee sold the village to a person who again sold it to the present appellant in April, 1884; and on March 10, 1891, the representatives of the mortgagors sued the representatives of the mortgagee and the appellant, and prayed for an account to be taken under the mortgage, and for return of possession of the village. They alleged that the whole debt had been discharged out of the proceeds of the village in 1885.

The defendants filed written statements whereby they alleged that the village became absolutely theirs by virtue of the decree above mentioned.

On September 5, 1891, the original Judge dismissed the suit, with costs. In his judgment he said, "I understand, from the provision of three months' grace allowed in the decree for discharging the debt, the District Judge meant that the mortgage would be foreclosed by the default made, and that afterwards the lands could be delivered to the decree holder unconditionally, as was subsequently done."

Against this decree the plaintiffs appealed to the High Court of Madras, which, on February 21, 1893, reversed the decree of the original Court, and remanded the suit for decision on its merits. In its judgment the High Court said, "The reasonable

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construction of the decree is that it intended to put the mortgagee in possession on condition that he should recoup himself the mortgage debt and interest out of the usufruct of the mortgaged property as provided in the bond, and remain in possession until the debt and interest were thereby liquidated."

*Mayne*, for the appellant, contended that the High Court had misconstrued the decree of the District Court of Godavari. The real intention of that decree was that the mortgage should be foreclosed. No doubt that was not the right remedy to have given, having regard to the character of the mortgage. But it had become final, and consequently the mortgagors, who might have corrected it either by appeal or in review, lost all title to the land after the three months of grace. Besides, the respondents should have sought their remedy (if any) in execution proceedings in the former suit, and not have brought a fresh suit in order to construe the decree in a former suit.

The respondents did not appear.

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Feb. 22.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The plaintiffs in this suit, who are respondents in the appeal, represent the mortgagors of the property in dispute; and the defendants, one of whom is appellant, represent the mortgagee. The present question is, what was the effect of a decree of the District Judge which was passed on September 16, 1876, and which directed that the mortgagees should be put into possession of the property?

The mortgage was effected by deed dated July 15, 1870, for securing Rs.2011 and interest. The debt was to be paid by four instalments. On failure to pay "you should recover the same by means of the mortgaged property, the crops of our cultivation, and our other property, and from our person." Though it is not here expressed that the mortgagee's remedy is to be by sale under decree, the mortgage falls within the class of "simple mortgages" as classified in Sir A. Macpherson's work on Mortgages, p. 12, and in the Transfer of Property Act, 1882. In such a mortgage there is no transfer of ownership, and the mortgagee must enforce his charge by judicial sale.

In the year 1876 the mortgagee, being unpaid, filed a plaint,

and prayed for a decree directing the mortgagors to pay debt and costs and interest until realization of the money by means of the mortgaged property and other property. That is precisely the relief to which a simple mortgagee is entitled, whether before the Act of 1882, or since.

The difficulty has arisen from the decree which the Court thought fit to make on this plaint. After affirming the mortgagee's right to a decree for the money, the District Judge said that, "In accordance with the custom prevailing in the Courts in this Presidency, three months' time will be allowed to the defendants within which to pay up the whole sum now decreed, principal and interest and costs, failing which the plaintiff shall be put in possession of the immoveable and moveable property specified in the bond sued upon and in the plaint and schedule as provided in the terms of the bond." And he made a decree accordingly.

That decree was not according to law. In default of payment, a simple mortgage gives to the mortgagee a right, not to possession but to sale, which he must work out in execution proceedings. In referring to a Madras custom, the District Judge probably meant only a practice of the Courts to give three months for payment. If he meant a custom to give possession on a simple mortgage, as the High Court think he did, there is no such custom. And Mr. Mayne frankly admitted that the mortgagee was not entitled to the relief given; and that there is no ground for thinking that the decree was agreed on in Court, or consented to by the mortgagor.

The mortgagor, however, did not appeal, and did not seek relief by way of review until it was too late. The decree, therefore, stands, and is binding on the parties; and the mortgagee took possession under it. He has since sold the property, but that does not affect the rights of the mortgagor. The question is, in what character was the possession taken? If in the character of a mortgagee, the mortgagor had a right to redeem, which was not barred by time when this suit began.

Mr. Mayne contends that the decree was intended as a foreclosure, and is so in effect. The only other kind of possession which can be suggested is usufructuary possession, lasting until

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—

the debt is discharged by the profits of the estate ; and Mr. Mayne urges that there is nothing in the judgment to suggest such a possession, and that " terms of the bond " do not warrant possession of any kind. All that is true ; but it does not compel the inference that the decree amounts to foreclosure. There is nothing in the judgment to suggest a foreclosure any more than usufructuary possession ; nothing indeed to throw light on the terms of the decree. All we know is that possession was given, and given under some error.

If it were necessary to speculate nicely on the meaning of the Judge, their Lordships would be disposed to agree with the High Court, who consider that when the Judge used the expression " as provided in the terms of the bond " he was thinking that the right given by the mortgage to recover by means of the mortgaged property and the crops meant a right to enter and take the profits. That is certainly more in accordance with " the terms of the bond " than is a foreclosure ; which is not a recovery of the debt by means of the property, but a substitution of the property for the debt. If, indeed, the matter were new, it might reasonably be argued that the terms of a simple mortgage justify usufructuary possession ; but long practice, now embodied in a statute, has settled that the remedy of the mortgagee is a judicial sale.

It is, however, hardly necessary to follow the High Court into this speculation. It is sufficient that the mortgagee, not being entitled to foreclosure, and not asking for it, got a decree which did not purport to work foreclosure. It purported to give possession " as provided in the terms of the bond." That was impossible, for there were no such terms ; but it purported to do that, and did not purport to put an end to the bond and to the relations of mortgagor and mortgagee altogether. It could, though subject to correction on appeal, give possession, and did so. The mortgagee thereupon became mortgagee in possession ; and as such he must submit to be redeemed.

Their Lordships will humbly advise Her Majesty to dismiss this appeal.

Solicitors for the appellant : *Burton, Yeates & Hart.*



JOGESWAR NARAIN DEO . . . . . PLAINTIFF;  
AND  
RAMCHUND DUTT AND OTHERS . . . . . DEFENDANTS.

J. C.\*  
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Feb. 11, 22.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Hindu Will—Construction—"For your Maintenance"--Putra poutradi krame.*

Where a Hindu testator gave a 4-anna share of his estate to his daughter and her son "for your maintenance," with power of making alienation thereof by sale or gift :—

*Held*, that on the true construction of such gift each took an absolute interest in a 2-anna share of his estate, and the words "for your maintenance" did not reduce the interest of either to one for life only :

*Held*, also, that the widow's conveyance of her share operated as a severance of the joint tenancy which had been created by the will between her and her son, and was effectual without her son's consent.

*Vyadinada v. Nagammal* (L. R. 11 Mad. 258) overruled.

APPEAL from a decree of the High Court (June 28, 1893) reversing a decree of the Subordinate Judge of Midnapore (Sept. 29, 1891), and dismissing the appellant's suit with costs.

On January 20, 1879, Srimati Doorga Kumari, the mother of the appellant, executed a perpetual lease of her half share in a 4-anna share of Silda zemindary, the subject of a devise by her husband Rajah Mokund Narain Deo, the testator in the cause, to herself and her son in the terms set out in the judgment of their Lordships. The lease was granted to the respondent Ram Chund Dutt at an annual rental of Rs.450, in consideration of Rs.25,000.

The suit was brought in March, 1891, by the appellant against his mother and Ram Chund Dutt and other members of the family who were stated to be interested with him in the lease of 1879. The issue material to the appeal raised questions as to the nature of the interest taken by Srimati Doorga under her husband's will, and as to her power to make the lease in question, and, in case her absolute power of alienation failed, what maintenance was she entitled to.

\* *Present* : LORD WATSON, LORD SHAND, LORD DAVEY, and SIR RICHARD COUCH.

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The Subordinate Judge was of opinion that, on the due construction of the will, "no power was given to the Rani singly to deal with the property." That "the power of alienation conferred by the will could not be restricted to her singly." And that, "considering also that it is generally the intention of a Hindu that his estate or ancestral estate should remain in his family, and that a Hindu is well aware that women do not take absolute estates of inheritance, the testator did not intend that his widow should take an absolute estate." In support of that finding the Subordinate Judge referred to *Mahomed Shumsool v. Shewukram*. (1)

And, as the result, he held that all that the Dutts took under their lease from Rani Doorga was what she was entitled to for maintenance, which he found on the evidence to be Rs.360 per annum, which he considered to represent a 3-gundahs and 2-krants share of the 2 annas comprised in the lease, and he accordingly decreed that the lease should stand good only for that proportion during the life of Rani Doorga.

The High Court ruled, on the contrary, that on the face of the document there was a gift made of these 4 annas to the Rani and her son jointly, followed by words of limitation, but without defining the shares. "It would be what is known in English law as a joint tenancy in fee. It has been argued in this Court, and has received the approbation of the judge below, that it was never intended that the Rani should obtain anything more than a charge for maintenance. We find nothing in the document which supports that contention. No doubt, a Hindu widow does not, according to law, take more than a right of maintenance in the husband's estate, unless there is a partition. Here the lady does not take as a Hindu widow, but as one of two joint devisees who are, as far as we can see, given an estate of inheritance. Then it has been argued, that even if this contention be not correct, still as the grant was a grant for maintenance, that the lady could not be considered to have more than an estate for life, and that the meaning of the limitation of the Bengali words used—namely, "putra poutradi krame"—shews that Rajah Mokund Narain's intention was to

(1) L. R. 2 Ind. Ap. 7, 17.

create an estate which, at the time of his death, went to the widow and her son and son's son in succession. If this were the case, we think it clear that the suit must fail. The estate granted to the Rani and her son would not be an estate of joint tenancy, but rather one of tenancy in common. So that the putni lease granted to the Dutts would be good for her life at least. The plaintiff, therefore, could not recover possession of the disputed property, and his suit must be dismissed. We, however, cannot acquiesce in the view put forward by the counsel for the plaintiff. The words have a well known legal meaning in Bengal, and mean that an estate of inheritance is granted. This has been the law of Bengal for a long time. It was further argued by the learned counsel for the plaintiff that, whatever may be the nature of the interest and the estate given by the Rajah Mokund Narain to the Rani and her son, paragraph 7 of the will implied an intention on the part of Rajah Mokund Narain to take away the ordinary power which each of them had possessed of alienating their share. We are unable to find any such prohibition. Even if there had been such a prohibition in so many words, the question would arise whether such a prohibition would not be inconsistent with the grant; but we do not find any such prohibition, either express or implied."

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*Cowie, Q.C.*, and *Branson*, for the appellant, contended that the construction of the will adopted by the first Court was correct. The will must be read in reference to the ordinary provisions of the Hindu law, which are strongly adverse to the widow's absolute estate or to her possession of any absolute power of alienation. The intention here was to create an hereditary estate, so far as the whole 4-annas share of Silda was concerned, for the maintenance of Srimati Doorga Kumari and her children in the first instance. Subject to such maintenance the estate was to be held for the benefit of any children which she might bear to the testator. There was no express power of alienation given to her personally of alienating for her own debts or other purposes, and to the prejudice of such children, a moiety or any other portion of the 4 annas in



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question. Notwithstanding that the gift to a woman is in terms which import a heritable estate, still the restrictions on her power of alienation which ordinarily hold good apply, unless the gift or devise is coupled with an express power of alienation. The effect of a gift in such terms by her husband is that it descends to her heirs preferably to his, if they should be different persons, but cannot by her own act be alienated from his family. Reference was made to *Mahomed Shumsool v. Shewukram* (1); Mayne's Hindu Law, s. 617; *Koonjbehari v. Premchand* (2); *Prosunnocoomar v. Tarrucknath* (3). Even if the widow took absolutely, she took jointly with the appellant as joint tenants and not as tenants in common. Consequently she could not, before severance of the joint estate, alienate without consent of her coparcener: *Vydinada v. Nagammal*. (4) The widow and son could only be put on an equal footing by being made tenants in common. An outsider could not be introduced into the coparcenary. He could only come in on partition.

*Mayne* and *Phillips*, for the respondent, who were heard merely on the last point made by the appellant, contended that this view of joint tenancy was unknown to Hindu law. The only view of joint tenancy which Hindus possessed was that of the coparcenary existing amongst members of an undivided family with their inchoate rights as to title, varying according to subsequent circumstances, completed at partition. Even if the view put forward by the appellant were correct, the mere fact of conveyance of the interest of one joint tenant operated as a severance of title, and the purchaser would take a separate title to a definite share, the subject to which it related being worked out by partition.

*Cowie, Q.C.*, replied.

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The judgment of their Lordships was delivered by

LORD WATSON. This appeal depends upon the construction of certain provisions made by the will of the late Rajah Mokund Narain Deo in favour of the Rani Doorga Kumari, his youngest

(1) L. R. 2 Ind. Ap. 7.

(2) Ind. L. R. 5 Calc. 684.

(3) 10 Beng. L. R. 267.

(4) Ind. L. R. 11 Madr. 258.



wife, and of their son Jogeswar Narain Deo, the appellant. At the time of his death in November, 1870, the Rajah was possessed of an impartible paternal raj called Phoolkoosma, and also of a 6-annas share of the zemindary of Silda, which he had inherited from his maternal grandfather.

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The will, which was executed by the deceased upon March 15, 1869, appears to have been dictated by the apprehension that his youngest wife and her son would be unable to live peaceably with his eldest son, Jubraj Soonder Narain Deo, and the other members of the family after his death, and by his desire to prevent disputes arising between them after that event. The testator thereby directed that his elder son, now Rajah Soonder Narain Deo, should remain in possession of the whole 16 annas of his paternal estate of Phoolkoosma, subject to these conditions, that Rani Doorga Kumari and the appellant should get for their maintenance villages yielding an income of Rs.300, and should also retain possession of certain buildings which had already been assinged to them for their separate residence. Two of the 6-annas share of zemindary Silda were bequeathed by him to his successor in the raj. No question as to those provisions of the will is raised in this suit.

The remaining 4-annas share of zemindary Silda was disposed of by the testator in the following terms :—

“ The remaining 4-annas share I give to you Srimati Rani Doorga Kumari and the son born of your womb, Jogeswar Narain Deo, for your maintenance.”

His intentions with regard to the respective interests which were to pass, under that gift, to mother and son, were declared in paragraph 7 as follows :—

“ Upon my death you and your sons and grandsons, &c., in due order of succession, shall hold possession of the zemindary, &c., according to the above distribution of shares. And I give to you the power of making alienation by sale or gift.”

It was not disputed by either party that the expression “ according to the above distribution of shares ” refers to the distribution of the 6-annas share between Rajah Soonder Narain Deo on the one hand, and the appellant and his mother on the other. It was also admitted that the words “ you ” and

J. C. "yours" occurring in those passages of the will already quoted  
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At the death of the testator the appellant was a minor, and his mother, who was appointed manager of his property until he attained majority, entered into possession of the 4-annas share of zemindary Silda which had been bequeathed to them. On January 20, 1879, the Rani, in consideration of a sum of Rs.25,000, paid to her by Ram Chund Dutt and the other respondents in this appeal, executed in their favour a mowrussi mokurruri pottah in perpetuity of what is therein described as her own 2-annas share of the 4-annas share of zemindary Silda bequeathed to herself and the appellant. Upon his attaining majority the appellant brought the present suit for the purpose of having it judicially declared that the pottah thus granted by his mother was null and void, in so far as it extended beyond her own lifetime. The only ground of action disclosed in his plaint was that, according to the true construction of the will, the Rani took a right to maintenance out of the 4-annas share in question for the period of her life, whilst the appellant took an estate of inheritance in the whole 4-annas share, subject only to the burden of his mother's right.

The 6th, 7th, and 8th of the issues framed for the trial of the action are the only ones having any relation to its merits. They are in these terms :—

(6.) What right Doorga Kumari has acquired under the will of her late husband, Rajah Makund Narain Deo, and whether in terms of the will the mokurruri pottah granted by her is wholly invalid ?

(7.) Whether the Rani has acquired absolute right to 2-annas share of Silda ?

(8.) If the defendants be entitled to a share only proportionate to the amount of the Rani's maintenance, then what amount can properly be fixed for the maintenance of the Rani ?

The Subordinate Judge of Midnapore found that the Rani took no interest beyond a right of maintenance ; and he accordingly decreed that the pottah granted by her to the present respondents should stand good for her lifetime to the extent of 3-gundahs and 2-krants share, and that as regards the remain-

ing portion of the said 2-annas share the pottah be set aside. On appeal to the High Court, that decision was reversed by O' Kinealy and Amir Ali JJ., who held that the appellant and his mother took the same interest under the will, each to the extent of a 2-annas share, and on that ground dismissed the suit with costs.

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Their Lordships have had no difficulty in coming to the conclusion that the judgment of the High Court ought to be affirmed. It is no doubt true that the gift of the 4-annas share of Silda bears to be made to the Rani and the appellant "for your maintenance"; but these words are quite capable of signifying that the gift was made for the purpose of enabling them to live in comfort, and do not necessarily mean that it was to be limited to a bare right of maintenance. That no such limitation was intended by the testator appears from the language of the gift, which clearly shews that the interest given is an estate of inheritance, with express power to the donees of making alienation by sale or gift. Then the gift to both is made, not in similar language merely, but under the very same words. If there had been a gift to the Rani alone in these terms, there could hardly have been a doubt that it would have conferred upon her an estate of inheritance, with power of alienation; and their Lordships cannot understand why the same terms, when equally applied to her and the appellant, should be held to confer upon her any lesser interest.

In his argument for the appellant, Mr. Branson raised a new point which is not indicated in the plaint, and was not submitted to either of the Courts below. He maintained, upon the authority of *Vydinada v. Nagammal* (1), that, by the terms of the will, the Rani and the appellant became, in the sense of English law, joint tenants of the 4-annas share of Silda, and not tenants in common; and that her alienation of her share before it was severed, and without the consent of the other joint tenant, was ineffectual. The circumstances of that case appear to be on all fours with the circumstances which occur here, and, if well decided, it would be a precedent exactly in point. There are two substantial reasons why it ought not to

(1) Ind. L. R. 11 Madr. 258.

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be followed as an authority. In the first place, it appears to their Lordships that the learned judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenary between the members of an undivided family. In the second place, the learned Judges misapprehended the law of England, because it is clear, according to that law, that a conveyance, or an agreement to convey his or her personal interest by one of the joint tenants, operates as severance.

Their Lordships will humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss the appeal. The appellant must pay the costs of the respondents who have appeared to oppose this appeal.

Solicitors for the appellant : *Freshfields & Williams.*

Solicitor for the respondents : *J. F. Watkins.*



BAIJNATH SAHAI . . . . . DEFENDANT ;

AND

RAMGUT SINGH AND OTHERS . . . PLAINTIFFS.

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ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Limitation—Act XV. of 1887, Art. 12—Confirmation of sale—Bengal Act VII. of 1880, s. 7—Collector's Certificate.*

Where the Board of Revenue discharged an order of the Commissioner, dated January 25, 1884, which had confirmed a sale by the collector in 1882 ; but afterwards on August 21, 1886, discharged its own order and revived that of the Commissioner :—

*Held*, that the confirmation of sale dated only from August 21, 1886, and that a suit brought in July 1887, to set the sale aside was not barred by Act XV. of 1877, art. 12 :

*Held*, that according to the true construction of s. 7 of Bengal Act VII. of 1880 there is no foundation for a sale thereunder until a certificate has been made by the collector strictly in manner prescribed thereby, specifying the sum due and the person to whom it is due. Such certificate, when duly made, has after service of notice thereof under s. 10 the effect of a decree so far as regards the remedies for enforcing it.

**APPEAL** from a decree of the High Court (September 12, 1890) affirming a decree of the Subordinate Judge of Shahabad (April 19, 1888).

The estate of Bhadwar, which belonged to the respondents, who were ninety-one in number, was sold by the collector of Shahabad on September 24, 1882, for arrears of road cess amounting to Rs.516. At such sale the estate, the rateable value of which was found to be at least Rs.100,000, was bought by the appellant for Rs.1500.

The Bengal Cess Act, which authorizes the levy of a cess for the construction and maintenance of district roads and other means of communication, is Act IX. of 1880 of the Bengal Council.

By s. 98 of this Act, all arrears of cess due to any collector under this Act may be realized by such collector by any process provided by any law for the time being in force for the realiza-

\**Present* : LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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The Public Demands Recovery Act of 1880 is Bengal Act VII. of 1880, which is to be read and construed as part of Act XI. of 1859 of the Supreme Council (known as the Revenue Sales Act) and Act VII. of 1868 of the Bengal Council (an Act for the recovery of arrears of land revenue and of public demands recoverable as land revenue).

By s. 7 of Act VII. of 1880, when arrears of certain public demands (and road cess has been held (1) to be recoverable as a public demand) are in arrears, the collector of the district may make under his hand a certificate (in the Form 2 given in the said Act) of the amount of such arrears remaining unpaid, and may cause the same to be filed in his office.

By s. 8 such certificate shall, as regards the remedies for enforcing the same, have the force and effect of a decree of a civil court.

Under s. 10 when such certificate shall have been filed in the office of the collector, he shall issue to the judgment debtor a copy of such certificate and a notice in Form No. 4 given in the Act, and such certificate shall from the time it is served bind all the immoveable property of the debtor as if it had been attached under s. 274 of the Civil Procedure Code.

Such certificate may under s. 19 be enforced under the provisions of the Civil Procedure Code as a decree for money.

The procedure under this Act which should be observed by the collectorate authorities is explained in the case of *Mahomed Abdul Hai v. Gujraj Sahai*. (2)

The estate having been sold, the respondents on October 10, 1882, filed in the office of the collector their petition seeking to have the sale set aside under the provisions of s. 311 of the Civil Procedure Code on the ground of material irregularity.

They also appealed under the provisions of s. 2 of Act VII. of 1830 to the Commissioner of Revenue against the sale.

On January 14 and 25, 1884, the Commissioner dismissed the appeals.

(1) *Sadhusaran Singh v. Panchdeo Lal* (Ind. L. R. 14 Calc. 1).

(2) L. R. 20 Ind. Ap. 70.

On August 12, 1884, the Board of Revenue on the appeal of some of the respondents set aside the orders of the Commissioner and directed the collector to proceed with the inquiry upon the petition of October 10, 1882, under the provisions of s. 311 of the Civil Procedure Code.

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On August 21, 1885, the collector held his inquiry and delivered his judgment setting aside the sale on the ground of material irregularity, which caused substantial injury to the judgment debtors.

Against this judgment the appellant appealed to the Commissioner, who on March 11, 1886, dismissed the appeal on the ground of want of jurisdiction.

On August 21, 1886, the Board of Revenue cancelled their order of August 12, 1884, as wrong in law, and set aside the order of the collector dated August 21, 1885, which had (by refusing to confirm the same) set aside the sale, and re-established the orders of the Commissioner in January, 1884, which had upheld the sale.

The respondents having thus failed to get the sale set aside by the Revenue authorities, brought the suit in which this appeal arose.

The plaint charged that the sale was invalid and void owing chiefly to the informality and invalidity of the certificates granted by the collector on which the sale took place.

There was no certificate at all made or purporting to be made under s. 7 of the Bengal Act VII. of 1880 in Form 2 prescribed by that section. But two documents, one dated October 18, 1881, and called a "Notice of Demand," purported to have been made under s. 9 of Act VII. of 1880, and for Rs.197 4. which was said to be "due for the current year" without stating in respect of what the sum was due.

There was no certificate that the said amount was due, signed by the collector as required by the Act and by Form 2.

The other document was of the same character, but was dated March 10, 1882, and for Rs.176, which was said to be "road and public works cesses for the instalment of June, 1881."

The appellant pleaded that there was no informality or



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irregularity in any of the collector's proceedings and that the cause of action arose on January 25, 1884, when the sale was first confirmed by the commission.

Both Courts overruled the pleas of the appellant and decreed the suit; the High Court ruling that the documents called certificates were not proper certificates at all, but notices of demand issued under s. 9.

C. W. Arathoon, for the appellant, contended that this view was erroneous, and that at least the suit should not have been dismissed on that ground. The High Court was not justified in raising for the first time and deciding a point which was not taken by any of the various tribunals before which the case had come for adjudication. Even if, as a matter of practice, a new point could be taken at that stage, still the High Court was bound to disregard it. No grounds were open to the defaulting proprietors on which to impeach the sale, except such grounds as were declared and specified by them in their grounds of appeal to the Commissioner; see s. 33 of Act XI. of 1859, and *Rajah Gobind Lal Roy v. Ramjanam Misser* (1), where it was held that s. 33 applies not merely to cases where the sale has been irregularly conducted, but also where the sale has been illegal in consequence of some express provision of law having been contravened. These respondents allowed the sale to proceed without raising any objection as to the invalidity of the certificate and proceeded to set it aside without objection on that ground. They were estopped by their conduct during and after the sale from so contending, and the sale should not at the last moment have been set aside by the High Court on that ground. It was not denied that arrears of road cess and public works cess were due for the instalments of June and September, 1881, or that the sale took place for default in those arrears.

Upon the point of limitation reference was made to art. 12 of Act XV. of 1877, and it was contended that the suit should have been brought within a year of the first confirmation of sale by the Commissioner, that a cause of action then arose and

(1) L. R. 20 Ind. Ap. 165.



was subsequently barred, and that no new cause of action accrued because subsequent proceedings eventually revived the order. The revival of the order did not give a second cause of action or revive one which had already been barred.

*Branson*, for the respondents, was not heard.

The judgment of their Lordships was delivered by

**LORD DAVEY.** Their Lordships do not think it necessary to call upon the learned counsel for the respondents to address them in this case. It comes before this Board on an appeal from a judgment of the High Court of Calcutta, which affirmed, with costs, the judgment and decree of the first Subordinate Judge of Zillah Shahabad, dated April 19, 1888.

The litigation out of which the appeal has arisen concerned a sale purporting to be made by the collector of Shahabad of an estate called Bhadwar on September 24, 1882. The plaintiffs in the action, the present respondents, were the owners of that estate. They are very numerous, and are alleged to be more than one hundred in number. The defendant, and present appellant, was the purchaser at that alleged sale. The sale was impeached by the owners on various grounds which may be summarised by saying that they are to the effect that the sale did not comply with the requirements of the statute under which it purported to be made.

Before discussing that question there is another question which requires decision. The defendant pleaded in the Court below, and his learned counsel before their Lordships has argued, that the suit is barred by the Law of Limitation and it is necessary for this purpose to consider the dates. The sale, which it is sought to set aside, was made on September 24, 1882. It purported to have been confirmed by the Commissioner on January 25, 1884. The present plaint was not filed until July 26, 1887, and therefore if there were nothing more in the case than that, and if it was really confirmed in a final and conclusive manner on the date mentioned in 1884, the suit would be barred under the provisions of the Law of Limitation. It would come within art. 12 of the second Schedule, namely, a suit "to set aside any of the following sales :—A sale in

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execution of a decree of a civil court ; a sale in pursuance of a decree or order of a collector or other officer of the revenue," as to which the time of limitation is only twelve months from the time when the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought. It was decided in the Court below that a certain time, particulars of which will be referred to presently, should be excluded from the period of limitation under the 14th section of the Act, which provides that "In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or in a court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a court which from defect of jurisdiction, or other case of a like nature, is unable to entertain it."

Now the proceedings which gave rise to the argument which has been addressed to their Lordships are of a complicated character, and their Lordships do not think it necessary, for the purpose of the advice they propose to tender to Her Majesty, to express any opinion upon the merits of the litigation in the Revenue Court or to consider the various provisions of the different Acts relating to the matter. Suffice it to say that these present respondents being dissatisfied with the sale of the property which had been purported to be made on September 24, 1882, presented a petition to the Commissioner on the following September 26, asking that the sale might not be confirmed. Their petition was referred back to the collector for his report. He gave his report to the Commissioner, and finally the Commissioner, on January 25, 1884, refused the petition which had been tendered to him, and confirmed the sale. The present respondents were not satisfied with the decision of the Commissioner, and being, as their Lordships presume, advised that they had the right to do so, they presented a petition for revision, which was in the nature of an appeal to the Board of Revenue, and asked the Board of Revenue to reconsider, and, if necessary, discharge the order which had been made by the Commissioner confirming the sale,

On August 12, 1884, the Board of Revenue considered the petition addressed to them, and made an order setting aside the Commissioners' previous order confirming the sale, and they referred the matter back to the collector to consider the case upon its merits. Whether they were right or whether they were wrong in holding that the proceedings of the Commissioner had been irregular, and that the petition to themselves was irregular on the ground of want of jurisdiction, is not material for the present purpose, because it is not disputed that the parties were proceeding in good faith ; and it is apparent from the judgment of the Board of Revenue that the question was one of very considerable difficulty. It is to be observed that the effect of that order of August 12, 1884, was to leave the sale unconfirmed. The order of the Commissioner confirming the sale was discharged, and the sale therefore was left unconfirmed. There was no actual sale (supposing it had been otherwise regular) which would give the purchaser a title to enter into possession or to enjoy the fruits of the sale, or, in other words, there was no real sale to the benefit of which the purchaser was entitled.

Their Lordships now come to the proceedings before the collector. The collector made an order declining to confirm the sale from which there was an appeal to the Commissioner who, on March 11, 1886, held that he had no jurisdiction to entertain the appeal ; and therefore the order of the collector refusing to confirm the sale stood. From that decision the present appellant appealed to the Board of Revenue, and it came a second time before the Board. The Board of Revenue then reversed their previous decision in consequence, apparently, of some decision which in the meantime had been given in the High Court at Calcutta, and they discharged the order of the collector apparently on the ground that it was made without jurisdiction, and that they themselves had no jurisdiction to entertain the question. The effect of these proceedings was to revive—to use the language of the Board of Revenue—the order of the Commissioner of January 25, 1884, which from that date became an operative order.

It is not disputed by the counsel for the appellant that if that

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confirmation of the sale took effect only from the last order of the Board of Revenue on August 21, 1886, the suit is brought within twelve months, and the Law of Limitation is not an answer to it.

Now the present suit is a suit to set aside the sale on the ground of non-compliance with the provisions of the Bengal Act No. VII. of 1880 and was instituted within a year after the final order of the Board of Revenue. The Subordinate Judge, and the High Court agreeing with him, have held that the case before the collector, the Commissioner, and the Board of Revenue comes within the description of a civil proceeding for the same cause of action in the 14th section of the Limitation Act, and that the time occupied by those proceedings ought therefore to be excluded in the computation of time for the purpose of limitation. Their Lordships do not intend to express any opinion upon the question whether the proceedings taken by the parties to stay the confirmation of the sale was such a civil proceeding as referred to in s. 14 because in the view which they take of the present case that question does not arise. Their Lordships are of opinion that there was no final, conclusive and definitive order confirming the sale while the question whether the sale should be confirmed was in litigation or until the order of the Commissioner of January 25, 1884, became definitive and operative by the final judgment of the Board of Revenue on August 21st, 1886, or (in other words) that for the purpose of the Law of Limitation there was no final or definitive confirmation of the sale until that date. The second Schedule, article 12, says: "When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought." It cannot be said in the opinion of their Lordships when the parties were litigating before the Revenue Courts as to whether the sale should be confirmed or not—because that was the object of the litigation before the Revenue Courts—that the sale had become either final or conclusive. In fact, their Lordships are of opinion that there was not during the period which had elapsed between the date of the sale and August 21, 1886, any sale to set aside which a suit could have been brought. Therefore their Lord-



ships are of opinion that the confirmation dates only from August, 1886, and that the Law of Limitation is not a defence to this action.

Passing to the merits, their Lordships do not think it necessary to say very much with regard to them. Various grounds were mentioned in the proceedings and pleadings in this suit, and in the judgments of the Subordinate Judge, and of the High Court—in which the case was very fully discussed and considered—upon which it was alleged by the present respondents that the sale was invalid. Their Lordships do not think it necessary to express an opinion upon all those grounds because there is one ground upon which they entirely agree with the view taken in the High Court which cuts away the whole basis of the proceedings for the sale. It should be here mentioned that the 7th section of the Bengal Act VII. of 1880, under which the sale took place, contains this provision, that “When any arrears of the following public demands”—and this was undoubtedly a public demand under the Road Cess Act—“are unpaid by the persons liable to pay the same,” then—leaving out the immaterial provisions—“the collector of the district may make under his hand, and in Form No. 2 in the 2nd Schedule annexed to this Act, a certificate of the amount of such arrears so remaining unpaid, and may cause the same to be filed in his office; provided that no such certificate shall be made in respect of any such demand, the recovery of which is barred by any law of limitation for the time being in force.” Then s. 8 provides that, “Subject to the provisions of this Act, every certificate made under the provisions of s. 7 shall, as regards the remedies for enforcing the same, and so far only, have the force and effect of a decree of a civil court.” Then s. 10 provides that when the certificate is filed notice shall be given to the judgment debtor, and upon service of the notice the certificate has the effect of binding the immoveable property of the judgment debtor.

Now, it is obvious that those are very stringent provisions. The proceeding in the first instance is apparently *ex parte*. The certificate is to be made by the collector in a certain form and filed, and when the certificate is filed it has the effect of a

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decree against the persons named as debtors in the certificate so far as regards the remedies for enforcing it, and when served it also binds their immoveable property. It is unnecessary for their Lordships to point out the necessity there is when power is given to a public officer to sell the property of any of Her Majesty's subjects that the forms required by the Act, which are matters of substance, should be complied with, and that if the certificate is to have the extraordinary effect of a decree against the persons named in it as debtors, and to have the effect of binding their immoveable property, at least it should be in a form such as provided by the Act, which enables any person who reads it to see who the judgment creditor is, what is the sum for which the judgment is given, and that those particulars should be certified by the hand of the proper officer appointed by the Act for the purpose. If no such certificate is given then the whole basis of the proceeding is gone. There is no judgment, there is nothing corresponding to a judgment or decree for payment of the amount, and there is no foundation for the sale. The authority to proceed to the sale is based on the certificate which has the effect, as has been already pointed out, of a judgment or decree, and if no judgment or decree is given, and no certificate is filed having the force or effect of a judgment or decree, there can be no valid sale at all.

In the present case Mr. Arathoon—who certainly argued this case for his client with as much zeal as any counsel could bring to bear upon it—utterly failed to point out to their Lordships in this voluminous record any document corresponding with the certificate which was required by the Act as the foundation for the statutory sale. The documents he referred to when examined are found not to purport to be certificates under s. 7 at all, nor do they comply with the requirements of the form stated in the second Schedule of the Act. In the first place they purport to be mere notices for the amount demanded, not under s. 7 but under s. 9 of the same Act, which relates to a different subject-matter, that is “In case of arrears of public demand payable to officer other than collector, such officer may give notice to collector,” and they have nothing to do with

the sections of the Act now in question. One document contains these headings, "Names of Debtors," "Residences of Debtors," "Amount due to Government for which this notice is given"—it purports to be a mere notice—and "Nature of the demand made by Government for which this notice is given." It does not contain, as form No. 2 in the schedule requires, any certificate at all. Form No. 2 is in this form: "I hereby certify that the above-mentioned sum of Rs. ————mentioning the sum—" is due to the Secretary of State for India in Council," "from the above-named (blank)" with the date, signed by the collector in his name describing himself as collector of the place in question. There is no certificate at all here in which the collector undertakes the responsibility of finding a sum due, and the person to whom it is due in the manner required by the Act. To the other document the same observations apply that it neither purports to be nor is it in form or in substance a certificate of the character required by the Act in order to constitute a judgment in execution of which a statutory sale could take place. Their Lordships, therefore, cannot admit these documents as certificates in compliance with the provisions of the Act. Mr. Arathoon also referred to a third document which is of this kind. It is addressed to Hurdial Singh, proprietor of Mehal Bhadwar, and it says, "You are hereby informed that under the provisions of an Act of 1880 passed by the Lieutenant-Governor of Bengal in Council, a certificate has been drawn up by me for Rs.197 4. which you have to pay as road and public works cesses, and that the said certificate has been filed in this Court." Then it calls upon him to shew cause why he should not comply with the certificate. If there had been such a certificate that notice would have been in compliance with the Act, but notice that a certificate has been made is not equivalent to a certificate having been made; and if there was, as their Lordships have already expressed their opinion, no certificate, then notice to the proprietor that a certificate had been made and filed which was erroneous would not, of course, be a compliance with the Act.

It is further to be observed that by s. 10 a true copy of the certificate is to be transmitted by post, and only binds the

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immoveable property of the debtor after the notice has been served. If there was no certificate, of course there could be no notice of the certificate, and, therefore, there could be nothing to bind the immoveable property of the debtor, and enable the collector to sell.

Their Lordships do not think it necessary to go into the other grounds which are mentioned, and very fully discussed, in the judgment of the High Court in this case for holding the sale to be invalid ; but they entirely concur in the observations regarding the necessity for caution in sales of this description by public officers with which the judges of the High Court conclude their judgment.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal in the present case be dismissed. The appellant will pay to the respondents who have appeared their costs of the appeal.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitor for some of the respondents : *J. F. Watkins.*

ADVOCATE

*[Handwritten signature]*



MAHES HAR BAKSH SINGH . . . . PLAINTIFF ;  
AND

RATAN SINGH AND OTHERS . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMIS-  
SIONER OF OUDH, LUCKNOW.

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Feb. 18, 19 ;  
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*Mortgage by Hindu Widow—Justifying Necessity—Onus probandi—Suit by  
Heir of Mortgagee.*

In a suit by the heir of a mortgagee to establish against a Hindu's reversionary heirs the validity of a mortgage created by his widow :—

*Held*, that the rule as to onus probandi laid down in *Hunooman Pershad Panday's Case* (Moore's Ind. Ap. Ca. 418, 419) applies, and that the representative as well as the original mortgagee must prove that the widow borrowed for a legitimate purpose :

*Held*, further, that general evidence to the effect that the husband died in debt, and that his widow had substituted new securities at reduced interest for old ones, did not exempt the plaintiff from proving that the particular transaction in question was justified ; nor did it throw on the defendants the onus of proving the solvency of the husband's estate.

APPEAL from a decree of the above Court (Nov. 21, 1890) reversing a decree of the District Judge of Sitapur (Jan. 4, 1889), and dismissing the appellant's suit with costs.

Thakur Munnu Singh died in 1874, leaving Umrai Kunwar, his childless widow, who on July 12, 1884, executed in favour of Thakur Partab Rudr Singh, represented by his brother the appellant, a mortgage of the entire village of Sadhopur (being part of her husband's estate), to secure repayment of Rs.7000, with interest at 13 annas per cent. per mensem. The mortgage deed recited that the money was borrowed "in order to liquidate the debts due to bankers," without specifying whether the debts were her own or her husband's, and purported to convey an estate "which is in my proprietary possession and enjoyment without a co-sharer," without more particularly specifying whether the intention was to convey her husband's estate absolutely, or her widow's right, title, and interest therein. The due date of the mortgage deed was July 12, 1887.

Umrai Kunwar died on February 14, 1887, and her husband's

\* *Present* : LORD WATSON, LORD DAVEY, and SIR RICHARD COUCH.



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estate was eventually taken possession of by the respondents, the reversionary heirs of her husband, in whose favour mutation of names was effected.

The appellant shortly afterwards sued them to establish his mortgage as a binding charge on the estate in their hands. They denied the widow's power of alienation, beyond that of her widow's estate; and contended that the widow had incurred debts on her own account without necessity, and that out of the money borrowed on the mortgage in suit "not a single shell was paid to any of the lawful creditors of Munnu Singh himself, the widow's husband."

The District Judge found that "Umrai Kunwar borrowed the money she did of legal necessity, and that the profits she enjoyed of her late husband's estate were not sufficient to meet her liabilities." He considered that the evidence proved "that Munnu Singh was heavily in debt at the time of his death . . . . that he agreed to pay heavy interest so that his widow would be legally justified in contracting fresh loans at a lower rate of interest to pay off old ones," and not merely so, but that she was "legally bound to do so to protect and save the husband's estates for her husband's reversionary heirs." He also considered that there was no evidence to the effect that the profits Umrai Kunwar obtained off the estate sufficed to meet her liabilities. On the other hand, the evidence shews that the loans taken by Umrai Kunwar were at a low rate of interest, particularly the loan the present cause of action.

Ranjit Singh alone of the defendants appealed.

The Additional Judicial Commissioner held that "there was not a shred of evidence as to the circumstances under which the mortgage loan came into existence, nor as to the pressure or other legal necessity warranting its execution." He declined to "accept proof of general indebtedness and of good management in embarrassed circumstances, as being sufficient to make up for absence of that evidence which the Privy Council cases noted below (1) declare to be necessary." In

(1) *Hunooman Pershad Panday v. Mussumat Babooee Munraj*, 6 Moore's Ind. Ap. Ca. 418, 419; *Rao Kurun Singh v. Fyz Ali Khan*, 14 Moore's Ind. Ap. Ca. 200.

particular he relied upon this : " No evidence was adduced for the purpose of shewing that the lender made inquiry, and satisfied himself that there was any legal necessity for the loan " ; and the plaintiff's counsel " admitted that he was unable to connect this mortgage loan of 1884 with any debt of Munnu Singh, or to shew the particular purpose for which it was contracted." It could not be assumed, he considered, from the general circumstances of the case, that the particular mortgage debt in suit was contracted for a purpose recognised as a legal necessity by Hindu law.

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*Mayne and Branson*, for the appellant, contended that the Judicial Commissioner was not warranted by the Privy Council judgments on which he relied in concluding that the appellant had failed to discharge his burden of proof. He did not notice the fact that both the parties to the mortgage in suit were dead, that all the documents and agents of the original borrower were at the disposal of the defendants, and that it was not suggested that there was any evidence in existence which the appellant could have produced and had kept back. Evidence was given that the mortgage money was used to pay off previous mortgage loans of 1882 and 1883 ; and also that the husband's estate was involved, and that there was in consequence a continuous necessity for loans. Under these circumstances the legitimate conclusion from all the facts of the case was that the money was advanced for a purpose binding on the estate and accordingly the rule laid down in *Hunooman Pershad's Case* (1) was satisfied. Reference was made to *Baboo Kameswar Pershad v. Run Bahadoor Singh* (2), *Lala Amarnath Sah v. Rani Achan Kuar* (3), and *Cavalry Vencata v. Collector of Masulipatam*. (4)

*Cowell*, for the respondents, contended that on the true construction of the mortgage deed it did not purport to bind the husband's estate. Further, that the evidence fell short of proving either that the money in the particular instance was advanced for a legitimate purpose, or that the lender had

(1) 6 Moore's Ind. Ap. Ca. 418, 419.

(2) L. R. 8 Ind. Ap. 6.

(3) L. R. 19 Ind. Ap. 196.

(4) 11 Moore's Ind. Ap. 619



J. C. made any of the inquiries as to the existence of justifying  
 1896 necessity which are prescribed by the rule in *Hunooman's*  
 MAHESHAH Case (1) and by the Transfer of Property Act (IV. of 1882), s. 38.  
 BAKSH SINGH Either proof would be sufficient; but the absence of both  
 v. could not be supplied by inferences drawn from the general  
 RATAN circumstances of the case. The manager of the widow's  
 SINGH. estate had been called, and had not given the necessary  
 evidence. In fact, none of the witnesses spoke specifically  
 to the transaction in suit, or that the particular mortgage  
 money in suit had been in fact applied either to avert danger  
 to the estate or confer benefit thereon. It was consistent  
 with the evidence that the money had been borrowed by the  
 widow for her own purposes, and if applied to paying off  
 previous mortgages there was no evidence that those previous  
 mortgages bound the husband's estate.

*Mayne* replied.

1896 The judgment of their Lordships was delivered by  
 March, 20. SIR RICHARD COUCH. The suit in this appeal was brought  
 upon a mortgage of a village called Sadhopur, in the district of  
 Sitapur, part of the property of Thakur Munnu Singh, who  
 died childless in 1874, leaving Umrai (or Umrao) Kunwar his  
 widow. On his death she succeeded to his estate as his heir.  
 The mortgage is dated July 12, 1834, and was executed by  
 Umrai Kunwar. It states that she had borrowed Rs.7000  
 from Thakur Partab Rudr Singh, Talookdar of Rampur, at an  
 interest of 13 annas per cent. per mensem, payable in three  
 years, in order to liquidate the debts due to bankers, and in lieu  
 thereof had hypothecated the entire village Sadhopur, which  
 was in her proprietary possession and enjoyment without a co-  
 sharer. The mortgagee Partab Rudr Singh died on October 18,  
 1885, and the appellant—the plaintiff in the suit—is his heir  
 and representative. Umrai Kunwar died on February 14,  
 1887, and, an order for mutation of names having been made in  
 favour of the defendants—one of whom is represented by the  
 present respondents—as the heirs entitled on her death, they  
 entered into possession of the estate. The question in this



appeal is whether the mortgage is a valid charge upon the village after the death of Umrai Kunwar against the next heirs of her husband.

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The terms of it are consistent with its being such a charge ; but they are also consistent with its having effect only during the widow's life. The District Judge decided this question in the appellant's favour, and made a decree that the sum due should be realized by attachment and sale of the village. This decree has been reversed by the Additional Judicial Commissioner, and the suit has been dismissed.

According to Hindu law, Umrai Kunwar on the death of her husband became the full owner of the estate for her life ; but she had not the same power of alienation as a full owner has. Her power was a limited and qualified one—to alienate against the next heirs of her husband only for certain purposes which the law authorizes ; and the question to be decided is whether it has been proved that the mortgage was made for a legitimate purpose. It has been seen that in the present case the suit is brought by the heir of the mortgagee, and therefore what is laid down in *Hunooman Pershad Panday v. Mussumat Babooee Munraj Koonweree* (1), which has been held to apply to the case of a widow and the next heir of her husband, is not directly applicable. It is that, where the mortgagee with whom the transaction took place is himself setting up a “charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan.” But what is said in the next page—that if a charge “be created by substitution of a new security for an older one, where the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption in favour of the charge would be reasonable”—may have to be considered with reference to some of the evidence in this case. As it only applies to part of the loan it will be noticed afterwards.

(1) 6 Moore's Ind. Ap. Ca. 419.

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Although the suit here is not brought by the original mortgagee, the affirmative of the question whether the money was borrowed for a legitimate purpose is on the plaintiff who seeks to have the mortgage enforced, and in proof of this he ought to produce sufficient evidence of the nature of the transaction. The evidence given was to the effect that when Munnu Singh died he was deeply indebted, and, his estate being taken into the charge of the Court of Wards, claims by mahajans to the amount of Rs.65,000 were registered. The estate was under the management of the Court of Wards for seventeen months, and was then given up to the widow. No evidence was produced from the Court of Wards of the value of the estate or of the incumbrances upon it, nor did it appear that any endeavour had been made to obtain such evidence. One witness said that Munnu Singh's revenue from his estate was Rs.6500, and that debts which carried interest at the rate of 24 per cent. per annum were paid by borrowing money at 10 per cent. Other witnesses also spoke to this, and said that the estate was improved by the widow's management. Bhawani Singh, the brother of Umrai Kunwar, and said by one of the witnesses to have been her principal agent, was examined for the plaintiff. He said that during Munnu Singh's lifetime he assisted in the management of the estate ; that he was indebted in his lifetime, at a guess, he should say in about Rs.65,000 ; the Thakurain paid off debts borrowing from Rampur (meaning Partab Rudr Singh) ; that by her management the estate was improved ; that she borrowed at reduced interest to pay off debts carrying heavier interest ; the creditors were attaching property in execution of decrees against her, and she therefore borrowed, and that the debts were incurred by the Thakur. On cross-examination he said that without looking at accounts he could not give the total of revenue ; he could not state the Thakurain's monthly expenses ; he could not give any idea of what should be her monthly expenses ; attachment was made in his presence, he could not say for how much. Their Lordships are unable to believe that the witness could not give more precise evidence of the condition of the estate and the nature of the various loan transactions. There was no explanation of the non-production



of the accounts. There was evidence of other witnesses that two or three days after the mortgage sued upon was executed mortgages to the amount of Rs.5000 were paid with the borrowed money. All these mortgages appear to have been made in 1883, and in the four which are in the record Umrai Kunwar is stated to have borrowed the money and brought the same to her own use. There is no evidence connecting any of these mortgages with a debt of her husband, and so no ground for presuming that they were made for a legitimate purpose.

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The District Judge in coming to a decision in the appellant's favour appears from his judgment to have been influenced by the defendants not having proved that the profits which Umrai Kunwar obtained from the estate sufficed to meet the liabilities upon it. The defendants were not bound to prove this. His decision about the mortgage sued upon seems to be founded on general evidence that Munnu Lal was heavily indebted at the time of his death, that he had agreed to pay heavy interest, and the widow had contracted fresh loans at a lower rate of interest to pay off the old ones, the loan on this mortgage being one of them. But it is said in the judgment of the Additional Judicial Commissioner that on the hearing of the appeal it was admitted by the counsel for the then respondent—now the appellant—that he was unable to connect this mortgage loan of 1884 with any debt of Munnu Singh, or to shew the particular purpose for which it was contracted. The appellant is not the original mortgagee ; but that does not exempt him from proving the nature of the transaction, and their Lordships cannot infer from the facts proved that the money was borrowed for a legitimate purpose. They will therefore humbly advise Her Majesty to affirm the decree of the Judicial Commissioner and to dismiss this appeal. The appellant will pay the costs of it.

Solicitor for appellant : *J. F. Watkins.*

Solicitors for respondents : *Barrow & Rogers.*

J. C.\* BHAIYA ARDAWAN SINGH . . . . . DEFENDANT;

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AND

Feb. 19, 20 ;

March 5.

RAJA UDEY PARTAB SINGH . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH, LUCKNOW.

*Holding for Maintenance—Nature of Grant—Evidence as to antecedent Possession—Presumption—Award.*

Where an award directed that the villages in suit "given as maintenance be decreed in favour of plaintiff to continue as heretofore" :—

*Held*, in an action of ejectment, that evidence as to the nature of the antecedent possession of the villages, and also of the quasi-judicial acts of the arbiters, was admissible.

It appearing therefrom that the villages, though originally granted to the donee rent free for maintenance, were not limited to him personally, but to him and his direct lineal descendants through males in the order of primogeniture, and that possession had followed the grant in the prescribed order :—

*Held*, that the villages will not revert to the talookdar until that line of descendants has become extinct and that the Government revenue is payable by the talookdar.

APPEAL from a decree of the Judicial Commissioner (March 30, 1891) reversing a decree of the District Judge of Fyzabad (Nov. 12, 1888).

The broad question raised by the appeal was whether the appellant was entitled to any and what right in two villages, the subject-matter of the suit, forming part of the talook of Bhinga, whereof the respondent was proprietor or talookdar within the meaning of the Oudh Estates Act (I. of 1869).

It was an admitted fact that the whole property constituting the Bhinga talookdari estate, including the villages in suit, had been confiscated by Lord Canning's proclamation of March, 1858, and had been granted to the Rajah of Bhinga, and before suit belonged to the respondent, who held a sanad for the same, including the two villages Sochouli (including Basthanwa) and Gutwa, which were in dispute.

\**Present* : LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.



The appellant and respondent were lineal male descendants of Rajah Sheo Singh. The former was his great grandson in the younger line, through his son, Umrao and grandson Jabraj. The latter was in the elder line.

The claim of the appellant was to hold the villages in dispute on a permanent hereditary tenure, not only rent free but Government revenue free. The Government revenue for them had been paid by the respondent.

After the death of Umrao Singh, his son Jabraj preferred a claim about the year 1868 before the British Indian Association.

That body consisted of certain leading Oudh talookdars, who, with the sanction of the Government of India, had taken on themselves to decide questions regarding the provisions necessary to be made for cadet members of talookdari families generally with the consent of the talookdars concerned in each case, and where the claim was not of an adverse and antagonistic but of an amicable character.

As against the respondent, Jabra then claimed the zemindary or sub-proprietary right in a number of villages, but only a maintenance right in the two villages in question. Two pottahs of 1804 and 1808 were filed as the source of Jabraj's title.

The award, dated July 6, 1869, ordered as follows: "This allegation creates the form of an under-proprietary right, therefore it is ordered that the claim for zemindari of the twenty-eight villages and for village Jeogarh, which had been given to him for killing a tiger, be dismissed, the plaintiff being at liberty to institute his claim in Court; that the two villages (Gutwa and Basthanwa), given as maintenance, be decreed in favour of plaintiff (to continue) as heretofore (ba dastur)."

The award was on July 16, 1869 confirmed by the Financial Commissioner, who considered that the allowance made by the talookdars was a liberal one for maintenance.

On the death of Jabraj Singh his representatives, in 1885, obtained an order for mutation of names in their favour. The Assistant Commissioner, in making the order, said: "I do not see on what principles Dakhil Kharij can be refused to the heirs of Jabraj Singh, i.e., his two sons and grandson, and widow. Section 28 of Act I. of 1869 only applies to annuities. And

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the awards of the British Indian Association, unless expressly stated to be for life, are I believe always taken to be hereditary. Jabraj Singh's heirs will be entered as under-proprietors of Sochouli and Gutwa, names of mortgagees being shewn separately."

In 1887 the respondent sued in ejectment, alleging that the villages were not declared by the award to be heritable by the heirs of Jabraj Singh, and that the same therefore became resumable on his death; that the villages also became liable, under the rules of the association, to the payment of the Government revenue assessed thereon; and that the defendants refused to deliver up the villages or to pay the revenue. The respondent prayed, in the alternative, for a decree declaring the defendants liable to pay the revenue and other public assessments.

The appellant, on the other hand, the other defendants being mere maintenance-holders from him without rights against the respondent, contended that the effect of the award was to direct that the interests of Umrao in the villages was to continue as theretofore, i.e., rent free, transferable, and heritable.

The District Judge held—

1. That the award was not an award of a life maintenance, but was a confirmation of the estate which Jabraj then had, i.e., a decree for the rights which he had theretofore exercised.

2. That, in the absence of any evidence sufficient to impugn the genuineness and authenticity of the two pottahs of 1804 and 1808, they were genuine documents, and admissible in evidence under the Indian Evidence Act (Act I. of 1872), s. 90.

3. That the grant in question was originally made as a provision for Umrao's branch of the family, and had been held for three generations undisturbed, which would imply heredity, and that the possessors had during that time exercised powers of transfer and alienation such as usually appertain to proprietors or sub-proprietors, which was all they claimed to be; and he therefore held that it was a heritable sub-proprietary right which Jabraj had been all along exercising, and that this had been confirmed to him by the award of 1869, and descended to his heir, the appellant.



He further held, that though the appellant was entitled to hold the land rent free, it did not follow that he should also hold it revenue free. He accordingly directed him to pay Rs.1875 as his proportion of the annual revenue payable in respect of the whole talook.

The Judicial Commissioner held that the two pottahs of 1804 and 1808 had not been proved by evidence and that there was no legal presumption in favour of their genuineness. If genuine they did not purport to convey a heritable title, nor could any such intention be inferred from the subsequent conduct of the parties.

As to the meaning of the award, he held that to be "that as the parties were agreed that Jabraj held these villages 'Muafi' for his maintenance, he was to continue to hold them 'ba dastur,' i.e., on the same terms and by the same tenure." That Umrao had no estate of inheritance, but held only as "a grantee for his maintenance," and that Jabraj held on the same tenure, and had no proprietary right whatever.

*Branson*, for the appellant, contended that the award was valid and binding between the parties, and that, according to its true construction, when considered in reference to all the circumstances of the case proved or admitted, the appellant was entitled to an absolute estate in the two villages in suit rent free, and as against the talookdar revenue free. It was admitted that the appellant and his predecessors in title had been in possession since 1804 and 1808. That possession was preserved to them after the confiscation, at the time of the summary settlement, and also at the time of the regular settlement. That possession began under the pottahs of 1804 and 1808, which, under s. 90 of Act I. of 1872, must be held to be genuine. By the terms of those pottahs, under the circumstances existing at the time they were granted, and by the conduct of the parties since the grant, it was shewn that the intention was to convey a heritable interest. As a matter of fact the villages had passed from father to son by inheritance, and had been held rent free and revenue free, and accordingly by the terms of the award the appellant was entitled to retain

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them on that footing. There had been an adverse holding by the appellant and his predecessors for more than twelve years, and the respondent must prove a right to resume in order to shew a cause of action. Reference was made to *Saligram v. Mirza Azim Ali Beg* (1); *Prince Mirza Jehan v. Nawab Afsur Bahu Begum* (2); *Shaik Budurooddeen v. Haneef Mullick* (3); *Baboo Lekhraj Roy v. Kunhya Singh* (4); *Nawab Malka Jehan v. Deputy Commissioner of Lucknow*. (5) The absence of words of limita'tion is immaterial, for they are not necessary by Hindu law to pass an estate of inheritance: *Sreemutty Anundmohey Dossee v. Doe*. (6) See, further, *Gunga Deen v. Luchman Pershad* (7); *Raja Majendra Singh v. Jokha Singh* (8); *Watson & Co. v. Mohesh Narain Roy* (9); *Salur Zemindar v. Pedda Pakir Raju*. (10)

Mayne, and C. W. Arathoon, for the respondent, contended that, assuming the pottahs to be genuine, they only conferred upon Umrao Singh, according to their true construction, an estate for life. The evidence does not prove an hereditary possession, but only a possession for life taken successively by arrangement between the parties. It is the common case that Jabrai was rightly in possession; but he admitted that he held the villages as intermediate holder for maintenance, and not as sub-proprietor by an independent title. No length of holding by him on those terms could enlarge his title or confer upon him an estate by prescription. There was no grant to him, but merely a putting of him in possession so that he might enjoy the rents as a maintenance for his life. The award of July, 1869, did not purport to alter the relation between the parties, but to continue it exactly as it stood. It recognised Jabrai as a holder for maintenance, and did not recognise in him any rights of a heritable character. Nor did the pottahs. The rule laid down in the *Salur Zemindar's Case* (10) was that the presumption of law is that a grant to a member of the family entitled to maintenance is a grant in lieu

(1) 10 Moore's Ind. Ap. Ca. 114.  
(2) L. R. 6 Ind. Ap. 76.  
(3) 5 Suth. W. R. 180.  
(4) L. R. 4 Ind. Ap. 223.  
(5) L. R. 6 Ind. Ap. 63.

(6) 8 Moor's Ind. Ap. Ca. 43.  
(7) 1 N. W. P. 147 (new ed. 229).  
(8) 19 Suth. W. R. 211.  
(9) 24 Suth. W. R. 176.  
(10) Ind. L. R. 4 Mad. 371.

of maintenance, is personal to the grantee, and is resumable at his death. It is further laid down that if members of a particular branch of a family have for three generations held lands, the presumption is that the original grant in lieu of maintenance was intended as a grant for the support of the collateral branch in perpetuity: see also *Rajah Woodoyaditto Deb v. Mukoond Narain*. (1) But that rule applies only where there has been no subsequent interference by way of revision or confirmation on the part of the grantor, and also where the grant is in favour of several members. Here it was an individual grant personal to each individual holder for his life, and no claim was ever put forward until this suit to hold on a permanent hereditary and transferable tenure. Besides, whatever title Jabraj might have had was swept away by the confiscation, and his rights and those of his family must now rest on the terms arrived at between him and the talookdar to whom the estate was regranted after the confiscation.

*Branson*, replied.

The judgment of their Lordships was delivered by

LORD WATSON. The parties to this appeal are lineal descendants, through males, of Rajah Sheo Singh, who at the beginning of this century possessed the talook of Bhinga: the respondent being the descendant of Sarabjit Singh, his eldest, and the appellant of Umrao Singh, his second son. At the time of the Mutiny the talook was confiscated; but it was subsequently restored to the family, and was settled in 1856-57, and again in 1858-59, upon Rajah Kishen Dutt, the son of Sarabjit. Rajah Kishen Dutt died in 1852, and was succeeded by the respondent.

Jabraj Singh, father of the appellant, who was the son of Umrao Singh, died in 1881; and, in March, 1887, the present suit was brought by the respondent, in which he claims proprietary possession of two villages within the talook, Gutwa and Basthanwa, which are also known by the common name of Sochouli, and, in the alternative, that the appellant is bound to relieve him of the revenue payable to Government in respect

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(1) 22 Suth. W. R. 225.



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of these two villages. The only ground of action disclosed in the plaint is, that the title upon which Jabraj held possession of the villages was a grant for maintenance, resumable by the talookdar upon his decease.

It is not disputed that, in point of fact, the villages in question were successively possessed by Umrao and his son Jabarj from a period long antecedent to the date of the Mutiny, and that, during their possession, revenue duty was invariably paid by the Rajah. On the re-settlement of the talook after the Mutiny, various disputes arose between the Rajah Kishen Dutt, on the one hand, and Jabraj, on the other, with regard to the nature and extent of the interest which the latter had in the talook. These disputes were submitted by Jabraj to a body of Oudh talookdars, with the late Maharajah Sir Maun Singh at their head, known as the British Indian Association, who had undertaken the amicable decision of claims preferred by cadets of a family against their talookdar. Rajah Kishen Dutt became a party to the submission; and the proceedings which followed upon it are of material importance in considering the merits of the present case.

Jabraj insisted, before the arbiters, in a claim for no less than thirty-one villages, including the two now in suit, and a third which was alleged to have been granted to him by the rajah "as a reward, by reason of his accidentally killing a tiger." The arbiters adjudicated upon his claim for these three villages, but declined to entertain his claim for the remaining twenty-eight, holding that it did not relate to any right by cadetship, constituting an incumbrance upon the talook belonging to the head of the family, but asserted an absolute proprietary title adverse to him, and therefore ought to be enforced by an action at law. They rejected the claim of Jabraj for the village said to have been granted to him by way of reward; and, in regard to the subjects now in controversy, they found "that the two villages Gutwa and Basthanwa, given as maintenance, be decreed in favour of plaintiff (to continue) as heretofore." That deliverance was confirmed by Maharajah Sir Maun Singh on July 6, 1869.

The award was thereafter approved by the Financial Com-



missioner, and was filed in Court upon July 16, 1869, which was more than six months after the passing of the Oudh Estates Act (I. of 1869); and it therefore did not come within the provisions of s. 33 of the Act, which, if the award, with the Commissioner's approval, had been filed ten days earlier, would have made it "enforceable as if a court of competent jurisdiction had passed judgment according to the award and a decree had followed upon such judgment." But the award was not on that account invalid. It did not constitute *res judicata*, in the proper sense of that term; yet it was obligatory upon both parties to the submission and upon those whose interests they represented. Raja Kishen Dutt at that time represented the talook, and had power to submit the dispute to the association, so as to bind his successors; and the award, if it gives the appellant a right to possess these two villages, is available to him in any question with the present respondent. The real controversy in this appeal turns upon the construction of the deliverance issued by the British Indian Association. It conclusively determines that the villages were "given as maintenance"; and the parties mainly differ as to the true import of the expression "(to continue) as heretofore." According to the appellant's argument, it signifies that he was to take by succession the same right of possession which had been previously enjoyed by his father and grandfather. The respondent maintains that it merely gave Jabraj a right of possession for his lifetime, determinable on his death by the talookdar for the time being.

The appellant has in this suit produced two pottahs or deeds of grant, which were also produced by Jabraj in the submission, as his title to the villages, dated respectively in 1804 and 1808, and bearing to be executed by the Raja Sheo Singh in favour of his son Umrao Singh. The first contains a grant of the village Gutwa, and the second of the village Basthanwa, both grants being "rent free."

The District Judge of Fyzabad held that the award, though *per se* invalid, was binding upon the parties because they had accepted and acted upon it; but he came to the conclusion that, although the appellant was entitled to retain possession

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of the villages, the respondent was no longer bound to pay the Government duty, seeing that the award was silent upon that point. He accordingly dismissed the respondent's suit in so far as it prayed for proprietary possession, and decreed that the appellant should pay to him annually the amount of revenue assessed upon the villages. On appeal, the Additional Judicial Commissioner of Oudh reversed that decision, and gave the respondent decree for proprietary possession, in terms of the first alternative of his plaint. He was of opinion that the interest of Jabraj Singh in these villages before the Mutiny was nothing more than a right of maintenance during his lifetime ; and that the award had merely the effect of keeping alive the personal right of Jabraj, and conferred no interest whatever upon the appellant.

The District Judge held that the two pottahs of 1804 and 1808 were receivable in evidence as ancient documents coming from the proper custody. On the other hand, the Additional Judicial Commissioner found that these documents " have not been proved either by evidence or by presumption of law." In that finding their Lordships cannot concur. Legal presumption appears to them to be in favour of the authenticity of the pottahs, and, so far as the terms of the grant which they contain are expressed, they are entirely consistent with the facts of the case which are aliunde admitted or proved. They expressly state that the grants to Umrao Singh were of the two villages in question, and that under them the possession of these villages was to be rent free ; and it is either proved or admitted that since the date of the grants the villages were successively possessed by Umrao and the next male descendant of his body, the revenue duty being paid by the talookdar.

It is no doubt true that the grants made by these pottahs are, in some respects, as indefinite as the award of 1869. They do not state that the grant was confined to a right for maintenance ; and they do not specify whether such grants, if given for maintenance only, were to Umrao Singh personally, or were to be inherited by his descendants. They are conceived in general terms, which are quite capable of being construed in either of these ways, and according to the nature of the



possession which was had under them with the assent of the talookdar. In the present case, their Lordships are of opinion that the state of possession which followed upon the grants, in the absence of any clear words of limitation, support the contention of the appellant.

In construing the final award of the British Indian Association, which determines that the right of maintenance then held by Jabraj Singh shall thenceforth continue as it had previously existed, their Lordships are of opinion that it is legitimate to refer, not only to evidence of antecedent possession bearing upon that point which is independent of the proceedings in the submission, but to those quasi-judicial acts of the arbiters upon which their ultimate award was based. All the evidence derivable from either of these sources leads, in their opinion, to the inference that the original grants to Umrao Singh, although intended for maintenance only, were not limited to him personally, but were in reality grants to him and his direct lineal descendants through males in the order of primogeniture; and, consequently, that the villages will not revert to the talookdar until that line of descendants has become extinct.

The respondent argued that it ought to be presumed as matter of fact that, on the death of Umrao, the right which he had obtained from Rajah Sheo Singh ceased to be operative, and that his son Jabraj then received a new grant for his lifetime from the talookdar. There is no evidence, oral or documentary, tending to suggest that such a transaction ever took place. The possession of the appellant's predecessors has been persistently ascribed, both in the pleadings in this suit and in the submission proceedings, to the pottahs of 1804 and 1808. Yet neither the respondent in this case, nor his predecessor in the proceedings before the British Indian Association, ventured to meet that statement by the assertion that Jabraj's right to possess the villages was derived from a grant of later date, made to him after the death of Umrao. The arbiters have recorded the fact that, before them, Beni Singh, the Rajah's agent, objected to the pottahs, when produced as his title of possession by Jabraj, not that there was another and later.

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grant to which his possession was attributable, but that the pottahs had probably been forged by him, as he had at one time the seal of the Rajah under his control. The arbiters subsequently recorded their own opinion upon Jabraj's claim, holding that he was entitled to the two villages Gutwa and Basthanwa "by right of primogeniture," or, in other words, because he was the eldest son of Umrao. That finding was obviously the basis of their final award, which was merely delayed until they inquired how far the claims of Jabraj were "adverse" to the Rajah, when they decided that they were of that character, and beyond their jurisdiction, in so far as relating to the twenty-eight villages.

In that state of the facts their Lordships have had little difficulty in coming to the conclusion that Jabraj possessed the two villages in succession to Umrao, and under the same grant. To that extent, they concur in the result arrived at by the District Judge. But they are unable to assent to his view that the terms of the award are insufficient to confer upon the appellant a right to possess the villages rent free. The award expressly bears that the right of possession, whatever its quality might be, was to continue as before, which plainly imports that, so long as it may be held to exist, the extent and incidents of possession under it are to be precisely the same as they were before the Mutiny. It is beyond dispute that one of the incidents of possession under the right before that time was, that the burden of paying revenue for the two villages fell upon the talookdar.

Their Lordships will for these reasons humbly advise Her Majesty to reverse the judgment appealed from, and to dismiss the respondent's suit with costs in both Courts below. The respondent must pay to the appellant his costs of this appeal.

Solicitors for appellant : *Barrow & Rogers.*

Solicitor for respondent : *J. F. Watkins.*

RAJAH MUHAMMAD MUMTAZ ALI } PLAINTIFF ;  
 KHAN . . . . . }  
 AND  
 SHEORATTANJIR AND ANOTHER . . . DEFENDANTS.  
 ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER  
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*Onus probandi—Consent Decree against Infant—Manager of Court of  
 Wards—Evidence of Authority to bind the Infant.*

The onus is on a defendant in ejectment who alleges a consent decree against the plaintiff whilst an infant to shew that the consent was given by a person legally authorized to bind him. There is no presumption in favour of the decree having been duly made.

Where the Court of Wards had been defendant as representing the infant, and a consent had been given by its mokhtar, who at the time alleged its authority in that behalf :—

*Held*, that effect would not be given to a decree so obtained without proof that such authority had actually been given ; and that in its absence an allegation that the mokhtar acted fraudulently and collusively was immaterial.

**APPEAL** from a decree of the Judicial Commissioner (July 7, 1890) reversing a decree of the District Court of Fyzabad (Aug. 20, 1889).

The appellant is the talookdar of Bilaspur, his name having been entered in Lists Nos. 1 and 2, published under Act I. of 1869. Included in his ancestral estate is a village called Katra forming part of his talook and comprised in his kabulyat or engagement with the Government. The question in the appeal was whether the respondent rightly obtained and was lawfully entitled to hold a sub-settlement right therein under the circumstances stated in their Lordships' judgment.

The appellant attained his majority in 1886, and two years later sued Maujgir to recover possession of Katra with mesne

\* *Present* : LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.



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profits. He alleged that Maujgir had obtained against him in 1872, while he was an infant, a decree for sub-settlement as birtdar under the Oudh Sub-settlement Act (XXVI. of 1866) through fraudulent collusion between him and one Thakur Pershad. It appeared that although the infant's estate was in the hands of the Court of Wards the defendant named in the plaint was "Manager, Bilaspur Court, Rajah Mumtaz Ali Khan." Salik Ram was the name of the manager, and his mokhtar, Thakur Pershad, was alone served with notice. He appeared, and stated that he had authority to admit the claim.

The District Judge held that the evidence failed to prove in favour of the defendant the existence of any birt tenure, or that the defendant's status differed from that of any other tenant. He then referred to Regulation X. of 1793 and Act XVII of 1876, and found that an officer having the powers of the Court of Wards (and in 1872 the Deputy Commissioner was such officer) could alone lawfully admit a claim on behalf of a minor; That the manager who alone had been impleaded had admitted the claim without referring the matter to the Court of Wards; that Thakur Pershad had no legal authority to admit the claim, and was guilty of collusion and fraud; and that the interests of the minor had been materially prejudiced by the way in which the plaint had been filed, and a false claim admitted. He decreed the claim with mesne profits.

The Judicial Commissioner, on the other hand, was of opinion that the Rajah was substantially a party to the sub-settlement suit.

"The plaint in that suit is headed *Maujgir Gushain v. Ilaka Bilaspur Court, Rajah Mumtaz Ali Khan*, i.e., the defendant impleaded was the Court of Wards for the Bilaspur estate on behalf of the Rajah Mumtaz Ali Khan. It is contended that the Rajah should have been impleaded through a guardian, and that as he was not so impleaded he is not bound by the decree. I am unable to accede to that contention. There can be no doubt that in point of fact no guardian of the Rajah's person as distinguished from a manager of the estate was appointed. Such



an appointment is, in my experience, very seldom made. The claimant naturally impleaded the Court of Wards as defendant, as he saw that it was in possession of and managing the estate, and on behalf of the latter an appearance was put in by a person who represented himself to be, and was accepted by the Settlement Officer as being, the mokhtar or agent of the Court of Wards. Perhaps it might have been more regular if the claimant had impleaded the Rajah personally, and, in the absence of any regularly appointed guardian, had asked the Court to appoint a guardian ad litem. But in the Oudh Settlement Courts twenty years ago such niceties of procedure were not observed, for, as remarked by Mr. Capper, Judicial Commissioner, in 1880, "the settlement Courts were constituted expressly to get rid of the strict procedure of the Civil Courts, and were regulated by the Financial Commissioner, whose orders had equal legal force with the statutes on which the procedure of the Civil Courts was based.

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"I hold it to be clear that the Rajah was substantially a party to the suit which ended in the decree of July, 1872.

"The error at the outside was one of form and not of substance. For had a guardian been appointed either ad litem or by the Court of Wards he would have been bound in defending the suit to act under the instructions of the Court of Wards. The Rajah's interests were, therefore, in no way prejudiced by the fact that he was not impleaded through a guardian.

"I now proceed to the allegation in the plaint that the decree of July, 1872, was obtained through collusion and fraud. When such allegations are put forward it rests on the party making them to prove them to the hilt, and not on the opposite party to disprove them.

"Now, as to collusion, it is not easy to see who are the two colluding parties. The suggestion, of course, is that the agent Thakur Parshad, or his uncle the manager, Salik Ram, colluded with the claimant to have a false claim admitted. But why should such collusion occur? There is not on record a shred of evidence to shew any intimacy or connection between

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Maujgir and either Thakur Parshad or Salik Ram. No reason whatever is assigned why the latter should wantonly sacrifice the interests of the minor Rajah for the purpose of benefiting Maujgir. On the contrary, their inclinations would naturally tend in quite the opposite direction. Then, as to fraud the argument is two-fold. Firstly, it is said that the mokhtar Thakur Parshad had no authority from the Court of Wards to confess judgment; and, secondly, it is contended that as Maujgir's claim to a birtdari tenure was unfounded, there must have been fraud in admitting it. The learned District Judge has to a large extent acceded to these contentions. I am unable to concur with him. He seems to me, firstly, to have too much lost sight of the fact that the burden of proof lay on the Rajah, and, secondly, to have disregarded the maxim "*Omnia præsumuntur rite solenniter esse acta.*" It seems to me that in condemning the settlement decree as fraudulent, it necessarily follows that the Settlement Officer who passed it was cognizant of the fraud. For from his very position as Settlement Officer he must have known all the circumstances of this large estate, and must have been acquainted with the persons of all the officials of the Court of Wards. So, unless it is to be supposed that the Settlement Officer was a party to the fraud, I must assume, that he knew and recognised Thakur Parshad to be the accredited agent of the Bilaspur Court of Wards in his Court. And that such was Thakur Parshad's position is proved by statements made by several of respondent's own witnesses in cross-examination. But it is said that Thakur Parshad's mukhtarnama did not empower him to confess judgment. If so, it was for respondent to prove that such was the case. Seeing that the Settlement Officer was satisfied with and acted on Thakur Parshad's authority in that matter, it certainly lay on respondent to shew that the authority was inadequate. And presumably proof of that matter would be in respondent's possession if, as is usual when an estate is released from the superintendence of the Court of Wards, all the papers respecting his estate were handed over to the Rajah. And that he had the papers can to some extent be gathered



from the 5th paragraph of the plaint. Anyhow, as the burden of proof lay on respondent, and as he has not discharged it, and further, seeing that Thakur Parshad appeared in court and professed to have the authority of the Court of Wards to do a certain act, and as the Court acted on his statement, I think I am bound to hold that Thakur Parshad, professing to act in a public capacity, was properly appointed and duly authorized in that respect."

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*Mayne* and *C. W. Arathoon*, for the appellant, contended that he was not bound by the sub-settlement decree, for he was not a party to the suit, nor therein represented according to law. The Court of Wards did not appear to have been a party thereto, nor was there anything to shew that the Deputy Commissioner in whose charge the estate then was ever gave his consent to the decree. The manager of the estate was not the guardain of the minor: a Hindu would never be appointed personal guardian of a Mahomedan minor. It was essential that under the circumstances every precaution should have been taken as provided by law that a properly constituted guardain should have represented the interests of the minor, and that he should be shewn to have given a considered assent to the decree, and to have acted in doing so under the direction of the Deputy Commissioner of Gonda. Reference was made to Regulation X. of 1793, ss. 7, 15, 16, 20, and 32; also to Act XIV. of 1882, s. 462, which repeats the provisions of the previous Codes of 1859 and 1877. The Court should have inquired and decided whether such admission was for the benefit of the minor. No decree against a minor has any validity unless a properly appointed guardian is before the Court. The manager of the estate is not a guardian of the person. The Court of Wards was the proper representative of the infant, and should be shewn to have superintended the conduct of the defence, and to have sanctioned the admission relied upon.

*Murison* and *Wallach*, for the respondent, contended that the sub-settlement decree had been regularly and legally



J. C. obtained without fraud or collusion, and was binding on the  
 1896 appellant. Reference was made to *Bhaba Pershad Khan v.*  
 RAJAH *Secretary of State for India in Council* (1), to Act XIV. of 1882,  
 MUHAMMAD s. 578, and to Act XVII. of 1876, ss. 175, 176. It was further  
 MUMTAZ contended that on the evidence the respondents had made out  
 ALI KHAN their title to the birt tenure which they claimed.  
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Counsel for the appellant was not heard in reply.

May 9.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The suit in this case was brought by the appellant against Maujgir Gushain, since deceased, of whom the respondents are the heirs, in the Court of the District Judge of Fyzabad. The plaint stated that the village Katra was the ancestral property of the plaintiff; that on the 31st May, 1871, the defendant, who was a lessee of 12 annas share of the village from the Court of Wards, instituted in the Settlement Court a wrong claim for birt tenure against the plaintiff, who was then a minor about six years old; that the plaintiff's estate was in charge of the Court of Wards, and he was not made a party to the suit; that on July 9, 1872, Thakur Parshad, agent, on the allegation that he was agent made a verbal admission of the claim and got a decree of birt tenure passed in favour of the defendant under which the defendant wrongfully held possession of the village. It was alleged that Thakur Parshad was not competent to make an admission of the claim, that the defendant was not a birt holder, and that the confession was collusive and fraudulent. The defendant in his written statement said that Thakur Parshad was competent to make confession, and he made the confession by direction of the Superintendent of the Court of Wards, that a birt patra (grant of land for subsistence) was filed with the settlement record and the decree was passed after inspection thereof, that the claim in the Settlement Court was instituted in a valid manner and in accordance with the rules then in force, that there was no fraudulent or collusive proceeding on the part of the defendant, and the claim was

admitted with the knowledge and permission of the Superintendent of the Court of Wards. These were the questions to be tried, and the following issues were settled by the District Judge:—1. Was Thakur Parshad competent to admit the claim? 2. Was he guilty of collusion and fraud? The District Judge found that there was no birt patra. He had examined the settlement record, and there was no trace of a birt patra having been filed. The Judicial Commissioner in his judgment did not say anything upon this question. It does not appear that he considered it; but their Lordships are satisfied that there was no proof of a birt patra. With regard to the regularity of the proceedings in the Settlement Court, the plaint in the copy filed in this suit is intituled *Maujgir Gushain v. Rajah Mumtaz Ali Khan*. The District Judge who examined the settlement file says, the plaint “was against Manager, Bilaspur Court, Rajah Mumtaz Ali Khan, not against Raja Mumtaz Ali personally. Summons was served by notice on manager of defendant (Salik Ram) see endorsement on back of plaint. Thakur Parshad is stated to be mokhtar of the Court of Wards.” Salik Ram was the manager of the estate; no guardian of the person of the minor was appointed. In the view which their Lordships take of the main question in the appeal it is not necessary to decide whether, as was held by the Judicial Commissioner, the Rajah was substantially a party to the suit, and his interests were in no way prejudiced by the fact that he was not impleaded through a guardian.

The recorded proceedings in the Settlement Court are as follows: The suit was filed on June 1, 1871. On June 28, 1872, the Settlement Officer recorded “Defendant by Thakur Parshad. I have sent to manager to have this claim admitted and will reply when report comes.” Under date July 9, 1872, the record is, “Defendant by Thakur Parshad says he has now authority to admit plaintiff’s right as formerly set forth. Decree by admission. Plaintiff entitled to lease as birtia on payment of Government jama plus 50 per cent. of same and half village expenses.” At the time of the trial of this suit Thakur Parshad was dead, but Salik Ram, the manager, was

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alive. His evidence was not taken. The Judicial Commissioner in his judgment says it was for the plaintiff to call him if he believed that by his evidence fraud and collusion could be established. It would be so if that had been the only issue. But on the issue, "Was Thakur Parshad competent to admit the claim?" the affirmative was on the defendant, and it was for him to prove that Thakur Parshad had authority to consent to a decree in that way by calling Salik Ram, and also shewing that he was authorized by the Court of Wards to give Thakur Parshad authority to make the admission. It was not sufficient that Thakur Parshad was the *mokhtar* of the Court of Wards, and said he had authority to admit the plaintiff's right. And this being the only evidence, the District Judge rightly found on that issue that he had no legal authority to do so. It is necessary that one who rests his case on a decree made by consent against an infant should shew that the consent was given by somebody having authority to bind the infant. Upon this question the Judicial Commissioner appears to have thought it was sufficient for a decision against the plaintiff that the Court of Wards was defendant, and on its behalf an appearance was put in by a person who represented himself to be and was accepted by the Settlement Officer as being the *mokhtar* or agent of the Court of Wards. On such a slight ground as this the decree of July, 1872, was held to be binding, and the minor to be deprived of his property. It is not necessary to determine whether there was fraud or collusion on the part of Thakur Parshad. There was no evidence of it; but as is usual in India, the plaintiff, or more probably his pleader, was not satisfied with alleging in the plaint that Thakur Parshad was not competent to make the admission, and thought to complete the case there should be a charge of fraud. In consequence of this both the Lower Courts seem to have considered it was necessary to decide that question. Their Lordships are of opinion that the decree of July, 1872, was not proved to be binding on the appellant, and that the deceased defendant had not the *birt* title which he claimed. They will therefore humbly advise Her Majesty to affirm the decree of the District



Judge and to reverse the decree of the Judicial Commissioner,  
and order the appeal to him to be dismissed with costs.

The respondents will pay the costs of this appeal.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondents : *Walker & Rowe.*

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MUTHUSWAMI MUDALIYAR AND } PLAINTIFFS ;  
OTHERS . . . . . }

AND

SUNAMBEDU MUTHUKUMARA- } DEFENDANT.  
SWAMI MUDALIYAR . . . . }

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March 19 ;  
May 9.

### ON APPEAL FROM THE HIGH COURT AT MADRAS.

*Hindu Law of Inheritance—Mitakshara—Bandhus—Maternal Uncle—  
Descendants of Father's Paternal Aunt—Priority of Heritable Right.*

The enumeration of bandhus as heirs in the Mitakshara, c. ii. s. 6, is not exhaustive. It is an attempt to classify those heirs by sample, not to specify every member of each class.

*Gridhari Lal Roy v. Bengal Government* (12 Moore's Ind. Ap, Ca. 448) followed.

Consequently a maternal uncle is an heir, though not specified, and cannot be ousted by the sons and grandsons of the father's paternal aunt, who, though specified, do not on that account exclude, or obtain any priority not recognised by the principle on which that classification is based :—

*Held*, also, that although a mother's half-brother may be postponed to her uterine brother, there is no authority for postponing him to more remote kinsmen.

APPEAL from a decree of the High Court (May 5, 1892), which affirmed a decree of the District Court of Chingleput (May 12, 1891) dismissing the appellants' suit with costs.

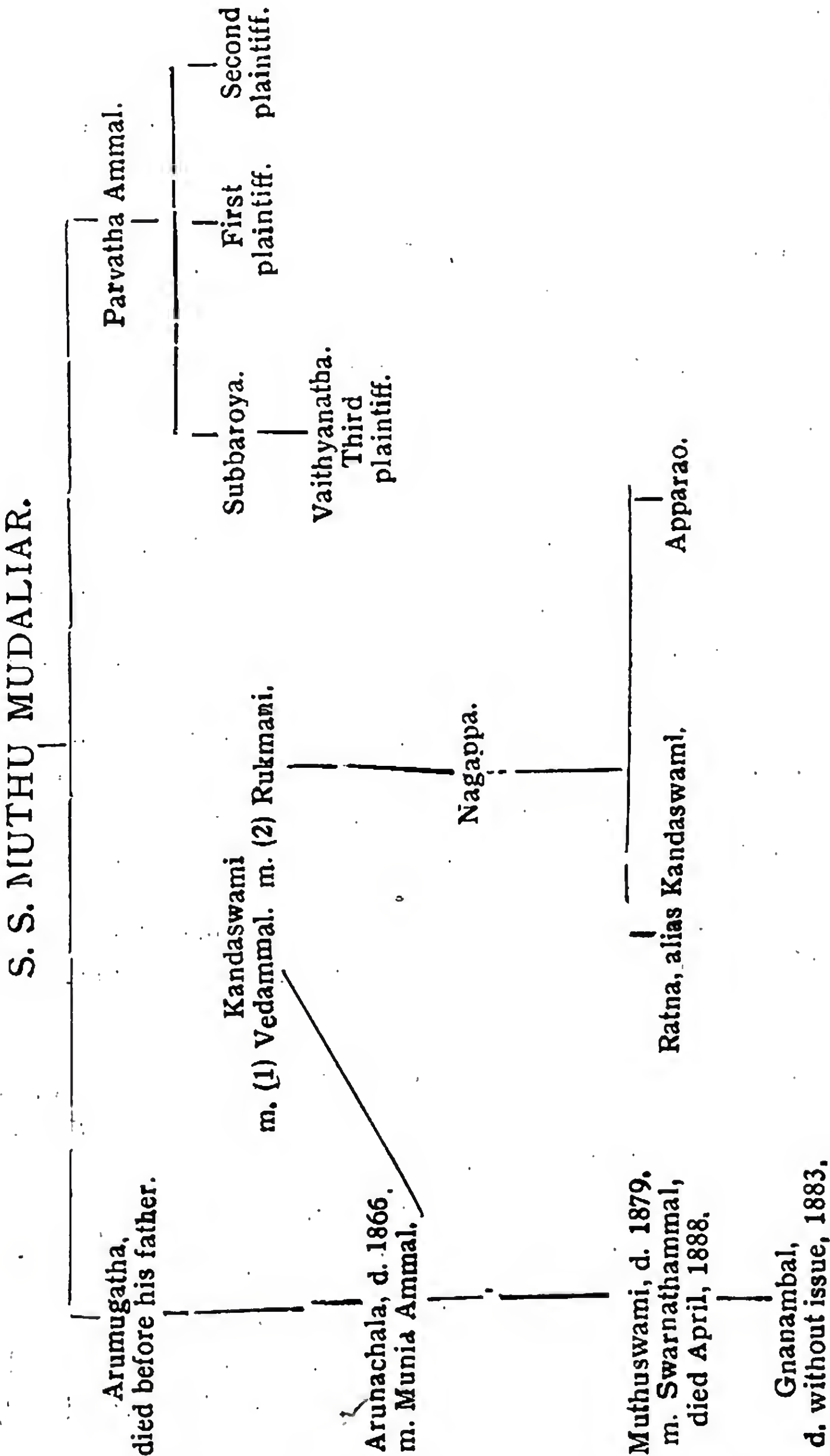
The question decided was, whether the appellants, or certain persons through whom the respondent claimed, were the preferable heirs of one Muthuswami Mudali, a Hindu inhabitant of Madras subject to Mitakshara law, and as such entitled to succeed to his estate. Muthuswami died sonless in 1879, and

\**Present* : LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

J. C. thereupon his estate vested in his widow Swarnathammal until  
1896 her death on April 14, 1888, when the succession in question  
opened.

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The relationship of the family, so far as material, appears from  
the following pedigree :—



It thus appears that Nagappa, under whom the respondent claimed, was the maternal uncle by half-blood of the last male

holder. The first and second plaintiffs were the sons of his grandfather's sister, while the third plaintiff was one degree more remote.

The District Judge stated the issue to be—

“Whether Vadapathi Nagappa Mudali, as maternal uncle of the propositus, is entitled to succeed as his heir in preference to the first and second plaintiffs, who are the father's paternal aunt's sons.”

It was admitted before the District Judge that Nagappa was only a step-brother of the said Muni Ammal, and the case was argued before him on the basis that Parvathammal was the full sister of Arumugatha.

The District Judge decided in favour of the respondent upon the construction put by him upon the text set out in their Lordships' judgment from the Mitakshara, c. ii. s. 6, verses 1 and 2, holding that a maternal uncle was a man's own bandhu (his atma bandhu) and was as such entitled to inherit in preference to a paternal grandfather's sister's son, who he held was not a man's own bandhu, but was his father's bandhu (his pitri bandhu).

Upon this construction of the law he decided that Nagappa, under whom the respondent claimed, was at the death of Swarnathammal the nearest reversioner of Muthuswami (being nearer than the appellants, who were his father's paternal aunt's sons), and was therefore a preferable heir to the appellants.

He held, also, that a half-brother of the mother was a maternal uncle within the meaning of the text referred to.

The High Court (Muttusami Aiyar and Parker JJ.) first dealt with the appellants' contention to the effect that a mother's step-brother is not at all one's bandhu or cognate kindred. They said: “As it is conceded that a maternal uncle of the full blood is a bandhu, and as it has been so held by the Privy Council in *Gridhari Lall Roy v. Bengal Government* (1), the contention for the appellants is not tenable. Further, a mother's step-brother is a bhinna gotra sapinda whether the term ‘sapinda’ is taken in the sense of consanguinity by virtue of

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the presence of particles of one body or of capacity to offer funeral oblations. Through the maternal grandfather, the maternal uncle is related to his sister's son as sapinda in the sense of consanguinity, and to that grandfather both the maternal uncle and his step-sister's son offer funeral oblations. We think the decision of the judge that the maternal uncle of the half-blood is one's own cognate kindred or atma bandhu is correct."

They then proceeded : " The next and the most important question is whether, under the Mitakshara law, the maternal uncle excludes the father's paternal aunt's son. The judge, who determines it in the affirmative, rests his decision on the ground that the former is one's own cognate kindred, whilst the latter is only the father's cognate, and that, as being the nearer in affinity, the former excludes the latter. It is not denied for the appellants that bandhus are of three classes, one's own cognate kindred, one's father's kindred, and one's mother's kindred, and that each class succeeds in the order in which it is named by reason of affinity. It is also not disputed that the text cited in Mitakshara, c. ii. s. 6, verse 1, mentions the maternal uncle's son as one's own bandhu whilst it mentions the father's paternal aunt's son only as the father's cognate kindred, and that if the text is accepted as binding so far as it illustrates the order of affinity, it is conclusive. But it is argued that the illustrations given in the text are not intended to denote the classes of bandhus in which maternal uncle's son and father's paternal aunt's son are to be placed for the purposes of inheritance, that the text itself has reference to relatives for whom pakshini or ninety Indian hours' pollution is intended to be prescribed, that hence it is first cousins or cousin-brothers are alone mentioned, and the more important bandhus are not named, and that though the author of the Mitakshara cites the text, he does not mean that the illustrations ought to be accepted as denoting that the several relatives named are to be treated for purposes of inheritance as belonging to the several classes in which they are placed. After thus endeavouring to put out of consideration the text cited by the Mitakshara, it is suggested that one's own sister, the father's sister, the grand-

father's sister, are all daughters born in the family, and that, as such, their sons should be placed in the class of one's own cognate kindred so as to exclude the maternal uncle, who is only a maternal relative. In support of this contention, our attention is also drawn to a recent publication on Hindu law by one Siromani. The text in question is in these terms: 'The sons of his own father's sister, the sons of his own mother's sister and the sons of his own maternal uncle must be considered as his own kindred or atma bandhus. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be considered as his father's cognate kindred or pitri bandhus. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, must be reckoned as his matri bandhus or his mother's cognate kindred.'

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"The text is clear that the maternal uncle's son, and therefore the maternal uncle, are atma bandhus, whilst the father's paternal aunt's son is only a pitri bandhu. There is no foundation for the suggestion that the Mitakshara did not intend to adopt the text so far as it illustrates the nearness or remoteness of affinity. The commentator expresses no dissent from the text, nor does he say that the illustrations are not correct; on the other hand, he founds upon it a rule of preference, and adopts it as a test of nearness or remoteness of affinity. It is also remarkable that all the commentaries of the Benares school follow the Mitakshara and cite the same text as illustrating the order of affinity: see Smriti Chandrika, Krishnasamy Aiyar's translation, c. xi. s. 5, verses 14 and 15; Vyavahara Mayuka, c. iv. s. 8, verses 22 and 23; Sarasvati Vilasa, Foulkes' translation, 595-8; Madhaviya, Dr. Burnell's translation, s. 41, p. 29. It is anything but reasonable to hold that a commentator like the author of the Mitakshara would indicate a rule of preference with reference to a text which, according to appellants' contention, erroneously places father's paternal aunt's sons who are atma bandhus among pitri bandhus. It is true that certain relatives only are named in the text as illustrations of each class of bandhus; but it does not follow that those who are named by way of illustration are



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either named incorrectly or are not named as examples of the order in which affinity is to be traced. It may be that the author of the Mitakshara, having defined bandhus as bhinna gotra sapindas, considered it sufficient to cite a text which contained illustrations as to the mode in which nearness or remoteness of affinity is to be ascertained, and to leave it to be determined in each case whether any particular relative who is not named and who claims to be bandhu is really a bhinna gotra sapinda, and comes as such within the definition of bandhu. It was on this view that the Privy Council held, in *Gridhari Lall Roy v. Bengal Government* (1), that a maternal uncle is a bandhu though not expressly named in the Mitakshara. The circumstance of the text cited not naming all the bandhus of each class, and even the most important of them, is no valid ground for treating the text as of no authority in regard to those who are expressly named as belonging to a particular class of bandhus."

*Sir R. Reid, Q.C.*, and *Branson*, for the appellants, contended that the High Court ought to have held that a maternal uncle of the half-blood was not an heir, and was not entitled to succeed as such in preference to the son of a man's father's paternal aunt. On the true construction of the passage in the Mitakshara relied upon, the maternal uncle is not a preferable heir to a father's paternal aunt's son. Males, in questions of succession, obtain a constant preference, being preferred to females: *Bhya Ram Singh v. Bhya Jubraj*. (2) Persons who offer oblations to a man's paternal ancestors (as a father's paternal aunt's son does) are preferable heirs to those who can only offer oblations to maternal ancestors, which is all a maternal uncle can do.

*Mayne*, for the respondent, was not heard.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE. The question in this appeal is one of pure law, relating to the inheritance of a Hindu gentleman who died in the year 1879. No facts are in dispute. He had

(1) 12 Moore's Ind. Ap. Ca. 448.

(2) 5 Beng. L. R. 293, 302.



no issue except a daughter who died without issue in 1883 ; his widow, who became his heir, died in 1888 ; at that time, when his inheritance opened, he had no collateral relatives of the same gotra with himself ; both parties claim as bandhus or cognates ; two of the plaintiffs are the deceased's first cousins once removed, being sons of his father's father's sister, and the third plaintiff is one degree more remote ; the defendants claim under a half-brother of the deceased's mother.

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The text of the Mitakshara which governs the question raised on these facts (c. ii., s. 6) is, as translated by Colebrooke, as follows :—

“ ‘On failure of *gotrajas* the *bandhus* are heirs. *Bandhus* are of three kinds, related to the person himself [*atma bandhu*] to his father [*pitri-bandhu*] or to his mother [*matri bandhu*] as is declared by the following text : The sons of his own father's sister, the sons of his own mother's sister and the sons of his own maternal uncle must be considered his *atma bandhus*. The sons of his father's paternal aunt, the sons of his father's maternal aunt and the sons of his father's maternal uncle must be reckoned as his *pitri bandhus*. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt and the sons of his mother's maternal uncle must be reckoned as his *matri bandhus*.’ ”

The commentator then says in the next verse :—

“ ‘Here by reason of near affinity the bandhus of the deceased himself [his *atma bandhus*] are his successors in the first instance : on failure of them, his father's bandhus (*pitri bandhus*) or if there be none, his mother's bandhus [*matri bandhus*].’ ”

The plaintiffs, being the sons and grandson of the paternal aunt of the deceased's father, are expressly mentioned as falling within the second kind of bandhus who cannot succeed until after failure of the first kind. They are, therefore, reduced to contend that the quoted text contains an exhaustive list of bandhu successors, and that as the deceased's maternal uncle is not mentioned in it he cannot succeed. Both Courts below have decided against that contention.

Their Lordships do not think it necessary to discuss the

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fanciful suggestion made in the Courts below, and refuted there with much care and learning, to the effect that the quoted text is addressed to religious ceremonies of purification rather than to positive rules of succession. To whatever extent rules of succession may have been founded on religious observances, or may now be explained by them, it is clear that fixed rules of law for successions have been established for ages, and equally clear that the Mitakshara professes to express such rules in the quoted text. Taking it to mean what it says, the question is whether its omission to mention a maternal uncle signifies that he is excluded from the first class of bandhus, or whether the writer is not rather classifying by sample without attempting to specify every member of each class.

Their Lordships are of opinion that even if the quoted text stood alone the only admissible construction would be the latter one ; for no rational ground can be assigned for excluding the maternal uncle of the deceased while his more remotely allied sons are admitted to succeed. But in fact the text does not stand alone, and whatever difficulty might at one time have been felt in applying it has now been removed by judicial decision.

In the case *Gridhari Lall Roy v. Bengal Government* (1) the person claiming to be heir was the maternal uncle of the deceased's father. The High Court of Calcutta decided against his claim on the ground that he was omitted from the quoted text. On appeal, this Board referred to a passage in the Mitakshara which is not translated by Colebrooke, but which was translated and used for the purpose of that suit. In that passage, which deals with the property of a trader dying abroad, his maternal uncle is included among bandhus capable of succeeding, though the order of succession is not there stated. The Board also referred to a passage of the Viromitrodaya as a work of high authority at Benares and properly receivable to explain things left doubtful by the Mitakshara. That passage states that maternal uncles are to be comprehended in the quoted text ; noting how objectionable it would be to exclude them while admitting their sons. This Board held that a

(1) 12 Moore's Ind. Ap. Ca. 448.



grand-uncle fell within the same reasoning, and upheld the plaintiffs' title.

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It is true that in that case the dispute was between the person claiming as heir and the Crown claiming as in default of heirs. But the grounds of the judgment apply equally to questions between nearer and more remote bandhus. The decision is precisely in point, and, as it entirely commands the assent of their Lordships, they examine this question no further.

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The only other question raised is whether a mother's brother by the half-blood stands on the same footing as an uterine brother. This point also is decided in the Courts below against the plaintiffs on grounds in which their Lordships entirely concur. A half-brother may be postponed to an uterine brother ; but there does not appear to be any authority, and certainly there is no reason for holding that he should be postponed to more remote kinsmen. In fact the point was not pressed by the appellants' counsel at this bar.

The result is that their Lordships will humbly advise Her Majesty to dismiss this appeal, and the appellants must pay the costs.

Solicitors for appellants : *Pemberton, Garth & Cope.*

Solicitors for respondent : *Lawford, Waterhouse & Lawford.*



J. C.\*  
 1896  
May 8.

NAWAB MIRZA ALI KADAR BAHADUR DEFENDANT ;  
 AND  
 INDAR PARSHAD AND ANOTHER . . . PLAINTIFFS.

*Registered Mortgage—Payment of Consideration Money—Onus probandi—  
 Income Tax Returns.*

The onus is on a mortgagor who seeks to get rid of his liability under a registered mortgage to shew clearly that, contrary to his own admission before the registrar, he received no consideration for it, and that the deed was fictitious.

He is not relieved of that onus merely because the mortgagee has made no return to the Government for income tax in respect of the annual interest accruing on the mortgage.

APPEAL from a decree of the Judicial Commissioner (Feb. 2, 1892) reversing a decree of the District Judge of Lucknow (Dec. 7, 1889).

The appellant is a member of the ex-royal family of Oudh, the plaintiff, now represented by the respondents, having been his agent to receive his monthly allowance of Rs.400 from the Wasika office.

The suit was brought on January 14, 1889, to enforce a mortgage bond dated February 6, 1883, under which Rs.49,540, principal and interest, were alleged to be due by sale of the appellant's hypothecated and other properties.

The appellant by his written statement admitted the execution of the mortgage, but denied the receipt of any consideration as alleged therein, and asserted that the mortgage instrument was benami, and that, being involved in litigation, he had, by the advice and at the suggestion of the plaintiff, his trusted agent, allowed the sums drawn by the latter for his Wasika allowance to remain in his hands, and had also deposited with him two sums of Rs.14,000 and Rs.20,300, and had executed the document in question so as to make it appear that he was involved in debt.

The District Judge found in favour of the appellant. His

\**Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD MOORIS, LORD JAMES OF HEREFORD, and SIR RICHARD COUCH.

determining reason was that in his return of income in his objection to income tax assessment the plaintiff had not included the appellant's bond.

"Plaintiff's learned counsel argued that after all plaintiff was assessed on an income of Rs.10,000, and that the interest on defendant's bond in suit is what makes up this amount. But the Commissioner's order records that plaintiff admits an income of Rs.1110: 9 from loans, Rs.3480 on a bond for Rs.29,000, and Rs.120 rents of houses—total Rs.5000; and he assesses him on Rs.10,000 because he much doubts if all the sources of income have been disclosed.

"It seems to me that if plaintiff's bond from defendant had been an actual and not a fictitious transaction, so shrewd a man would not have failed to include it in his return—it being a registered bond, and one in consequence liable to detection."

In the Judicial Commissioner's judgment reversing the decree in favour of the appellant, the following passage occurs:—

"There is one other not unimportant matter, to which allusion should be made. In the Court below several copies of income tax papers were put in for defendant, the object being to shew that in his income tax returns the plaintiff had not included the income he received as interest on this bond, the suggestion being that it was not included because the bond was fictitious. The learned District Judge attached considerable importance to these papers, and apparently they turned the scale in his mind against the plaintiff. On appeal it is contended that, those papers being inadmissible in evidence, the Court below ought to have paid no attention to them. Assuming for the moment that they are admissible, I am of opinion that they are of no weight either way. Admittedly the plaintiff's income from the interest accruing on this bond is not to be found in these returns. But to call on this Court to infer from that fact that therefore the bond is fictitious is rather a strong demand. Unfortunately, my own long experience in this country has taught me that—no doubt with many honourable exceptions—true returns of income assessable to income tax under Part IV. of Sched. II. of Act II. of 1886 are but seldom made. In the present case the return made by plaintiff was undoubtedly

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incorrect, and was so considered by the income tax officers, who assessed him on double the income he had returned. Defendant now asks that we should accept, and act on, as true a return which officials who had to deal with it treated as false. I cannot accept that proposition. To accept it would have the effect of giving a discharge from their bond debts to debtors the interest accruing from whose bonds was not shewn in their creditors' income tax returns, and might impose on a court of justice the duty of requiring from income tax officials information respecting matters which they are by law forbidden to disclose.

"I am, however, of opinion that, under the provisions of ss. 76 and 77 of the Evidence Act, and of rule 16 of the Rules (Notification No. 593 of February 5, 1886) made by the Government of India in pursuance of the power given by s. 38 of Act II. of 1886, these income tax papers were inadmissible in evidence, and should not have been taken into consideration by the Court below."

*Mayne*, for the appellant, contended that the Judicial Commissioner's finding in favour of the plaintiff was against the weight of evidence, and that he was wrong in holding that the income tax papers, which had not been objected to in the District Court, were inadmissible in evidence, or insufficient to give rise to the inferences suggested by the appellant.

*Cowie, Q.C.*, and *C. W. Arathoon*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

**LORD MORRIS.** In this case the plaintiff, one *Kanhaiya Lal* (the father of the respondents), who appears to have been a banker or money-lender, brought an action against the appellant to recover the amount due to him, as he alleges, under a mortgage deed of February 6, 1883, which was to be payable three years from the date of execution. The consideration for the mortgage was a sum of Rs.46,000 advanced to the defendant. That sum included the amount due upon two bonds and a mortgage, and a further advance made by the plaintiff to the



defendant. There is a provision, apparently for the protection of the lender, the plaintiff, that he should be continued receiver of the rents, somewhat as in an English mortgage deed the mortgagee sometimes reserves the right to appoint the agent, so that he may have the whip-hand. By way of shewing that the transaction was a bona fide one, and intended to be acted upon by the plaintiff, that deed is registered; and the borrower makes a declaration that he has received the amount. It is valueless if it can be gone behind in every case by an assertion that that which was stated at the time before the registrar was untrue. The onus in this case appears clearly to lie on the defendant. It is not easy to understand how the question came to be discussed. In this country he would probably have to institute a suit to set aside the deed as fraudulent before he could be listened to on a plea impeaching it. But, on the assumption that he must prove his case, what proof has he given that it is a fraudulent, fictitious deed, given for no consideration? There is nothing except his own statement, which is contrary to the statement he made before the registrar. The motive assigned is a fraudulent one, namely, that being involved in litigation, not with his general creditors, as far as can be seen, but merely with his wife and stepmother and other relations, and in order to lead them to the conclusion that he was an embarrassed man, he executed these deeds for the purpose apparently of diminishing his income by shewing that he was very largely indebted to the plaintiff. That is not a very meritorious way in which to initiate a case which seeks to set aside a deed as having been itself executed fraudulently. The appellant has really given no evidence that would have called for any answer from the plaintiff.

The plaintiff's case is very simple. He says that all these three transactions which were summed up in this mortgage bond of February 6, 1883, were for loans, and he gave evidence that he had sold what in this country would be called securities for the purpose of obtaining the money in order to hand it over to the defendant. There was some cross-examination as to the character of the books produced; but he did produce a day-book in which there were entries of the sales of property

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belonging to the plaintiff which realized the very amounts which the plaintiff alleged he gave to the defendant.

Upon that state of facts the District Judge arrives at the conclusion that the defence would be inconclusive, as he terms it, but for a new element which is introduced into the case by the allegation that the plaintiff had not debited himself in his return to the Government for income tax in respect of the interest on these bonds, and that the bond in question was thus shewn to be fictitious. The Judicial Commissioner of Oudh gave it as his experience that is a very common thing in India—it is not certain that it is not a very common thing in other places as well as India—for persons not to make a full return of their income, running the chance of being surcharged if they are found out. It appears in this case that the Judicial Commissioner at once doubled the return that the plaintiff had made, on the assumption, probably, as a general rule, perhaps a safe one, that it is only a half return that persons make. That, of course, would be a very wrong thing on the part of the plaintiff; but it does not appear to their Lordships to have any weight in changing the onus which lay upon the defendant of shewing that no consideration passed for this mortgage. Their Lordships adopt the judgment of the Judicial Commissioner, and will therefore humbly advise Her Majesty that this appeal should be dismissed.

The appellant must pay the costs of the appeal.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitor for respondents : *J. F. Watkins.*

HURRI BHUSAN MOOKERJI . . . .	DEFENDANT ;	J. C.*
AND		1895
UPENDRA LAL MOOKERJI AND OTHERS	PLAINTIFFS.	Nov. 13,
ON APPEAL FROM THE HIGH COURT IN BENGAL.		1896
<i>Practice—Concurrent Findings of Fact—Limitation—Suit to set aside an Adoption—Act XV. of 1877, Arts. 92, 93, 118.</i>		May 20.

The rule as to concurrent findings of fact will not be departed from merely because the High Court has admitted documents tendered by the appellant which the first Court had rejected.

Where a suit was brought in 1888 to set aside an adoption in 1887 which was in substitution of an adoption in 1884 :—

*Held*, that even if the ground of suit was the falsity of an alleged deed of authority to adopt, neither art. 92 nor art. 93 applied. The deed was not “issued” when the adoption of 1884 was made, nor was it “attempted to be enforced” at that date within the meaning of those articles :

*Held*, further, that art. 118 alone applied.

**APPEAL** from a decree of the High Court (July 14, 1891) affirming a decree of the Subordinate Judge of Nuddea (July 22, 1889).

The suit was brought by the respondents on September 29, 1888, to obtain a declaration that the adoption of the appellant by his mother (a former appellant, since deceased) was invalid as having been made by her after the death of her husband without his authority. For that purpose the plaint included a prayer to have it declared that the anumati patra, or power to adopt, alleged to have been executed on September 28, 1832, in favour of the mother by her husband Chunder Bhusan, had not in fact been executed, but was “spurious and false.”

The facts are stated in the judgment of their Lordships.

The question of law raised was one of limitation.

The articles of Sched. II. of Act XV. of 1877 bearing

\* *Present* : LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.



J. C. on that issue are the 91st, 92nd, and 93rd, which are as follows : —

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Description.	Period of Limitation.	Time from which period begins to run.
91. To cancel or set aside an instrument not otherwise provided for.	Three years.	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.
92. To declare the forgery of an instrument issued or registered.	Three years.	When the issue or registration becomes known to the plaintiff.
93. To declare the forgery of an instrument attempted to be enforced against the plaintiff.	Three years.	The date of the attempt.

The Subordinate Judge held that none of those articles applied, as the present suit was not one to cancel or set aside the alleged power, nor was it one to declare the forgery of an instrument, issued, as the power had never been issued before the present suit, nor had the defendant ever attempted to enforce it against the plaintiffs, inasmuch as the adoption which he found to have been made by the defendant in Bysakh, 1291 (May, 1884), was not an attempt so to enforce it.

The High Court did not deal with the question of limitation at all, but affirmed the finding of fact by the Lower Court that the anumati patra had been forged.

*Crackanthorpe, Q.C.*, and *Doyne*, for the appellant, contended that the rule as to concurrent findings of fact did not apply in this case, since they were not based on the same evidence, the High Court having admitted some documents which the first Court had rejected.

[LORD MACNAGHTEN referred to *Ram Lal v. Saiyid Mehdi Husain*. (1)]

They contended that on the entire evidence the validity of the anumati patra should have been upheld. It was further contended that under arts. 91, 92, and 93, set out above, a

suit to set aside or declare spurious the anumati patra was barred.

*Bompas, Q.C., Mayne, and C. W. Arathoon*, for the respondents, were not heard.

1896. May 20. The judgment of their Lordships was delivered by

J. C.

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LORD MORRIS. The plaintiffs in this suit, who are respondents in the appeal, make claim as reversionary heirs of Chunder Bhusan, who died in the year 1832. The defendants are his widow, who became his heir, and Hurri Bhusan Mookerji, whom the widow adopted in the year 1887. The substantial object of the suit is to dispute the adoption on the ground that no authority to adopt was given by Chunder Bhusan to his widow. The widow has died pending the appeal, which is now prosecuted on behalf of Hurri Bhusan.

Soon after her husband's death, the widow, or her friends, for she was then a girl of thirteen, asserted the existence of a written power to adopt, and she has at intervals renewed the assertion. But the instrument was never until the present suit produced in court, though there had been previous hostility and litigation between the widow and the reversionary heirs. No action was taken on it till the year 1884, when the widow adopted a boy. That boy died, and the present appellant was adopted four years afterwards. On these facts and on the oral evidence the Subordinate Judge decided that the instrument relied on was not genuine, and that the widow had no authority to adopt. On appeal the High Court took the same view.

It appears that the Subordinate Judge rejected certain documents produced from the Courts of the magistrate and the Collector, which the defendants tendered for the purpose of corroborating their oral evidence. The High Court admitted those documents. There was no dispute as to their construction; the only question was how far they added to the weight of the defendants' evidence, and the High Court thought they added very little. It is now contended that, because the High Court had before it materials which the Subordinate Judge had not, the case ought not to be treated as one in which there are



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concurrent decisions on facts. It would, however, be a strange thing if concurrent decisions were to have a less conclusive effect where the evidence in the first Appellate Court has been added to entirely in the interest of the appellant than they would have if his evidence had remained untouched. Their Lordships, indeed, have heard nothing inducing them to think that they would come to any different conclusion if the facts were all re-examined ; but they are quite clear that there is no ground for making the case an exception to the valuable rule against disturbance of concurrent decisions.

The remaining question is whether the suit has been brought in proper time. The material dates are the first adoption in 1884, the second adoption in 1887, and the commencement of the suit in 1888.

The Subordinate Judge carefully discussed the plea of limitation and overruled it. The defendants appealed on this point among others, but it can hardly have been pressed, for the learned judges of the High Court do not notice it in their judgment, and they say that the only question before them is whether the widow had power to adopt.

The Limitation Act of 1877 contains two articles specifically relating to suits for attacking and supporting adoptions respectively. No. 118 enacts of a suit to obtain a declaration that an alleged adoption is invalid, that it shall be dismissed if brought after six years from the time when the alleged adoption becomes known to the plaintiff. This suit, therefore, even if it were affected by the adoption of 1884, would not be barred by art. 118.

It is, however, argued that the principle of the Limitation Act is not to enable suits to be brought within certain periods, but to forbid them being brought after periods, each of which starts from some defined event, and that more than one article may apply to the same suit. So a plaintiff impugning an adoption may find himself impeded by other events, e.g., a legal proceeding protected by a shorter term of prescription. And in this case it has been urged at the bar that there are two other articles, namely, 92 and 93, which compel the dismissal of the suit.



By art. 92 a suit to declare the forgery of an instrument issued or registered must be dismissed if brought after three years from the time when the issue or registration becomes known the plaintiff. Assuming in the defendant's favour that this suit is one to declare forgery, is the instrument one of the kind indicated by the article? It was not registered, but, as argued for the appellant, it was issued when the adoption of 1884 was effected with full publicity. Their Lordships think it sufficient to say on this point that in their opinion the word "issued" is intended to refer to the kinds of documents to which people commonly apply that term in business, and that it has no application to an instrument such as a power to adopt.

By art. 93 a suit to declare the forgery of an instrument attempted to be enforced against the plaintiff must be dismissed if brought after three years from the date of the attempt. It is contended that the adoption of 1884 was such an attempt. It is, however, as the Subordinate Judge points out, very difficult to say that an adoption followed by nothing more is in any sense an enforcement of the power against other persons. Their Lordships are clear that it is not so within this article. If it were, art. 118 would have no force in cases where the plaintiff impugns an adoption on the ground that the power alleged for it is not genuine. They hold that this case is described by art. 118 alone, and therefore the suit is brought in good time.

They will humbly advise Her Majesty to dismiss the appeal, and the appellant must pay the costs incurred in this appeal of the respondents who have appeared.

Solicitors for appellant : *Barrow & Rogers.*

Solicitors for respondents : *T. L. Wilson & Co.*

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Feb. 26.

TOOLSEY PERSAUD BHUCKT . . . . . DEFENDANT;

AND

BENAYEK MISSER . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Concurrent Findings of Fact—Jurisdiction—Civil Procedure Code, s. 596.*

Where no question of law either as to the construction of documents or any other point arises on the final judgment, and there are concurrent findings of both Courts below on the oral and documentary evidence submitted to them :—

*Held*, that the appeal cannot be entertained.

APPEAL from a decree of the High Court (March 21, 1892) affirming a decree of Wilson J. (March 10, 1891).

The facts are stated in the judgment of their Lordships.

The High Court granted a certificate to the effect that the case as regards amount or value and nature fulfilled the requirements of s. 596, Act XIV. of 1882.

*Sir W. H. Rattigan*, for the appellant, contended that the evidence proved that he was a minor at the date of the execution of the mortgage of May 11, 1885. Also, that a minor being, as was contended, by law incompetent to contract, the deed of mortgage could not be validly ratified in the manner erroneously alleged by the respondent. Although there were concurrent decisions of fact, the High Court was right in granting a certificate under s. 596 of the Civil Procedure Code. There was a point of law involved, although that point was dependent on the finding as to the appellant's age. Reference was made to *Gopinath Birbar v. Goluckchunder Bose* (1); *Ramgopal v. Shamskhaton* (2) *Rajah Nilmoni Singh v. Kirti Chunder Chowdhry* (3); *Tayammal v. Sashachalla Naiker* (4); *Moulvie Sayyud Uzhur Ali v. Mussumat Ultaf Fatima*. (5)

\* *Present*: LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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(1) Ind. L. R. 16 Calc. 292, n.

(3) L. R. 20 Ind. Ap. 95, 97.

(2) L. R. 19 Ind. Ap. 228, 233.

(4) 10 Moore's Ind. Ap. 429, 435.

(5) 13 Moore's Ind. Ap. 232.

*Cohen, Q.C., and Mayne*, for the respondent, were not called on.

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The judgment of their Lordships was delivered by

LORD DAVEY. The suit out of which this appeal arises was one for foreclosure of two mortgages made by the first defendant in the action, Toolsey Persaud Bhuckt, in favour of the present respondent. The first mortgage was dated May 11, 1885, and the second mortgage or further charge was dated November 28, 1885.

The principal defence, and the one upon which the learned counsel for the appellant has principally addressed their Lordships, was that the appellant was a minor on May 11, 1885, at the date when the first mortgage was executed. It is obvious that that is a question of fact, to be determined by the evidence, documentary and oral, given in the case.

The case stands in this way. There was evidence given that the defendant was of age at the date in question. Evidence was given, chiefly based upon a horoscope, and supplemented by the oral evidence of three or four witnesses, that the defendant was a minor at that date, the date on which his birth was put being June 2, 1867.

The suit came, in the first instance, before Wilson J., sitting on the original side of the High Court at Calcutta. Certain issues were stated and tried by the learned judge, which are to be found in his judgment. The 9th issue was : " Was the first defendant at the date of the first mortgage a minor ?" The learned judge says : " The first question then is, was he an infant at the time of the execution of the mortgage ? He was admittedly of age at the date of the further charge." The learned judge then states, and comments upon, the evidence in favour of the first defendant having been of age at the date of that mortgage, and then he comments on the evidence against it. He says, " What have we against that ?" and then he states the evidence which was given, and he says, " That, I must say, is very unsatisfactory evidence to counterbalance the deliberate assertions of the first defendant himself, of the executors of his father's will, and the long



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series of acts on his part wholly inconsistent with the story that he was a minor at the time of the transaction. It is sought to confirm this evidence in two ways, and the first document that is used by way of confirmation is a horoscope which seems to me to be an extremely suspicious one." He concludes his observations in this matter thus: "I have little doubt that it is a made-up document, and made up with singular indiscretion." Then he refers to evidence which has been given in confirmation of the inference sought to be drawn from the horoscope, and he concludes by saying: "I think, therefore, that the evidence is strong to shew that at the time this mortgage was executed the first defendant was not an infant."

That judgment, as it appears to their Lordships, was a judgment given by the learned judge who tried the action and heard and weighed the evidence, on the effect of that evidence on his mind, and there does not appear to their Lordships to be any question of law whatever arising on the learned judge's judgment.

An attempt has been made to say that there was misconstruction of documents; but, in their Lordships' opinion, that attempt has wholly failed. It is not a question of misconstruction of documents. It was simply treated by the judge as a question of the weight to be attached to the evidence adduced before him.

When the case came before the High Court on appeal, the learned Chief Justice, Sir William Petheram, very carefully and very fully discussed all the evidence which was given in favour of the present appellant's case. He says, in the course of his judgment, commenting on that evidence: "I think that both these statements are false, and that they were made with the object of misleading the Court on this very question of the defendant's age"; and he concludes his opinion on this part of the case by saying, "In my opinion the defendant has entirely failed to prove that he was a minor when he executed the mortgage for Rs.20,000 on May 11, 1885, and that this issue must be found for the plaintiff."

Their Lordships think that no question of law, either as to

construction of documents or any other point, arises on the judgment of the High Court, and that there are concurrent findings of the two Courts below on the oral and documentary evidence submitted to them. That being so, the present appeal cannot be entertained.

There were several other issues, but really no argument has been addressed to their Lordships upon them. There does not seem to be any ground whatever for impeaching the finding of the learned judge, confirmed by the High Court, on the other issues that were raised, as to consideration for the mortgages, as to the defendant being so intoxicated at the time of the mortgages that he was unable to understand their nature, or that they were obtained by undue influence.

Under these circumstances their Lordships will humbly advise Her Majesty that the appeal be dismissed, and the appellant must pay the costs of the appeal.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondent : *Wrentmore & Swinhoe.*

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MILLER (ASSIGNEE OF THE ESTATE OF RAM } DEFENDANT;  
KISHEN) . . . . . }

AND

June 17, 24;

July 28.

BABU MADHO DAS . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

*Indian Evidence Act, 1872, s. 21—Admissions—Omission to object to Evidence—Evidence.*

In a suit against an insolvent and the official assignee for sale of mortgaged property, the onus is on the plaintiff to prove that title deeds in his possession after the insolvency were deposited with him as security before the adjudication.

Evidence of admissions by him at an earlier date than the adjudication to the effect that the deeds were then in his possession are inadmissible in his favour under s. 21 of the Indian Evidence Act, 1872, not being within any of the exceptions to inadmissibility named in that section.

An erroneous omission to object to such evidence does not make it admissible.

Conflicting evidence as to the factum of the deposit examined after the Courts below had differed, with the result that the suit was dismissed.

**APPEAL** from a decree of the High Court (May 10, 1892) reversing a decree of the District Judge of Mirzapur (April 9, 1890).

The substantial question in the appeal was one of fact on which the Courts below differed, whether a transfer of certain title deeds by the appellant to the respondent had been made in February, 1888, by way of equitable mortgage, or whether it had been made in March, 1889, by way of fraudulent preference. There were some subsidiary questions of law as to the admissibility of evidence.

The facts are stated in the judgment of their Lordships.

The District Judge found that it was not proved that the title deeds in question were delivered to the respondent's gomashtras in Calcutta in February, 1888. The High Court (Tyrrell and Knox JJ.) reversed this finding for various reasons, some affecting the credibility of witnesses whom the District

\* *Present*: LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.



Judge had disbelieved, and others relating to the sufficiency of the explanation given for the absence of any writing at the time of the alleged deposit. Further, they held that two witnesses, Rai Shiam Kishen and Baleshwar Prosad, had proved—the former, that he had in September, 1888, learned from Ram Kishen Das that he had given over documents to the respondent to satisfy him regarding his large claim; and the latter that the respondent had prior to September, 1888, “professed” to him that Ram Kishen Das’s title deeds had been delivered to him.

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Sect. 21 of the Indian Evidence Act, 1872, is as follows :—

Sect. 21 : “Admissions are relevant and may be proved as against the person who makes them or his representative in interest ; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest except in the following cases :—

“(1.) An admission may be proved by or on behalf of the person making it when it is of such a nature that if the person making it were dead, it would be relevant as between third persons under s. 32.

“(2.) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body relevant or in issue made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

“(3.) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

“Illustrations.

“(a.) The question between A. and B. is, whether a certain deed is or is not forged. A. affirms that it is genuine, B. that it is forged.

“A. may prove a statement by B. that the deed is genuine and B. may prove a statement by A. that the deed is forged ; but A. cannot prove a statement by himself that the deed is genuine, nor can B. prove a statement by himself that the deed is forged.”

J. C.            *Cohen, Q.C., and Branson, for the appellant.*

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*Cowie, Q.C., and Mayne, for the respondent.*

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1896. July 28. The judgment of their Lordships was delivered by

SIR RICHARD COUCH. Ram Kishen Das, who carried on a large business in Calcutta, was on March 2, 1889, adjudicated an insolvent by the High Court at Calcutta, and his estate became vested in the appellant as the official assignee. On May 6, 1889, the respondent's pleaders wrote and sent a letter to the appellant, stating that the respondent was a creditor of the insolvent for Rs.1,53,339 on balance of account with interest, that the respondent held as collateral security for his debt the title deeds and documents of certain houses and lands situate at Benares, Ghazipur and Mirzapur of the value of Rs.65 to 70,000, and that the title deeds of the properties were delivered to the respondent by the insolvent himself at Calcutta in February, 1888. And they inquired whether the appellant was prepared to admit the equitable mortgage. On the next day the appellant replied by letter that it would be necessary for him to make inquiries into the matter of the mortgage claim, and if the respondent could prove the mortgage to the satisfaction of the Insolvent Court he would be prepared to consent to the usual order for sale. He added that in the meanwhile he would be obliged if they would send for his inspection a copy of the memorandum which accompanied the deposit of the title deeds. On May 13 the pleaders replied that they were prepared to give the appellant sufficient time to make inquiries; but as he appeared to insist upon their proving the claim in the Insolvent Court, and made it a condition of accepting the mortgagee's right, they were prepared to seek their remedy in a court having jurisdiction to try the question at issue. They added that if the appellant wished to settle the matter out of court they were prepared to give him every facility in making inquiries into the matter, and for this reason they gave him one week's time to make up his mind with reference to the subject of their claim. On May 17 the appellant acknowledged the receipt of this letter, and referring to his of the 9th reminded



them that they had not complied with the request in it for a copy of the memorandum, and again asked for it. To this the pleaders on May 21 replied by letter "that the title deeds of certain houses &c. were made over to Babu Madho Das my client's agents Bhagwan Dass and Buldeovajee at Calcutta as collateral security for his debts. No written memo. accompanied the title deeds at the time of their deposit and for this reason we cannot furnish a copy of the same." On June 6, 1889, an order was made by the High Court at Calcutta for the respondent and his gomashtha to attend before the Court and be examined in the matter of the insolvency, and to produce the documents and deeds said to have been deposited. On the same day the respondent filed his plaint in the Court of the Subordinate Judge of Mirzapur against Ram Kishen and the appellant praying for a decree for the amount claimed for debt, and that in default of payment the properties alleged to have been mortgaged might be sold and the proceeds applied in payment. The appellant in his written statement denied that the title deeds were deposited as alleged in the plaint.

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On September 19, 1889, the suit was transferred from the Court of the Subordinate Judge to the Court of the District Judge of Mirzapur. Of the nine issues framed by him the only one which is now material is the fourth. That is, "Were the title deeds specified in paragraph 6 of the plaint deposited by defendant 1 with plaintiff or his agents in Calcutta in February, 1888?" The District Judge, in a judgment where the evidence is fully and carefully discussed, found that it was not proved that the title deeds were delivered to the respondent's gomashthas in Calcutta in February, 1888, and dismissed the suit. The respondent appealed to the High Court at Allahabad. That Court came to the opposite conclusion, and made a decree in the plaintiff's favour which is the subject of the present appeal.

Now the onus was on the respondent to prove that the title deeds which it appeared were in his possession when the letter of May 6 was sent were deposited by Ram Kishen with him or his agents before the adjudication of insolvency. His case depended mainly upon the evidence of Buldeo Tiwari (the



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Buldeovajee in the letter of May 21) and Bhagwan Dass, and their Lordships will first consider their evidence. Buldeo was first examined. He is the gomashta of the respondent, and had then been in his service for eleven years. His account of the deposit of the title deeds was this. There had been for some years large transactions between Ram Kishen and the respondent in hundis drawn by the former and accepted by the latter and from time to time renewed. On December 27, 1887, a hundi having become mature and the time for renewal having arrived, Ram Kishen drew a hundi for one lac of rupees, and sent it to the respondent from Calcutta requesting him to accept it. The respondent refused to accept it, which occasioned a delay of nearly a month. Then Ram Kishen came to Benares on the occasion of a marriage in the house of one of his relations. After the completion of the marriage the respondent told the witness that Ram Kishen had come to Benares, and said, "Go to him and dun him. Tell him that I shall never renew this hundi; may, I shall bring an action. Go to Ramkishun and tell him so." "After a day or two I went to Ramkishun and said, 'This time the plaintiff will by no means renew the hundi.' Then Ram Kishunji said to me, 'Go and tell the plaintiff that I paid him off when Rs.2,75,000 was due by me. Now a small balance is due.' I then came and said so to the plaintiff, who again said to me, 'Go and say that I won't listen.' I then went and told Ram Kishunji that the plaintiff was inflexible. Then Ram Kishun said to me, 'Go and tell the plaintiff that if he does not agree I will on my return to Calcutta give him what papers I have for his satisfaction.' Nay Ram (Ram Kishun) had said to me, 'If you come yourself I will give the papers to you, or the plaintiff may send anyone he likes.' I went and told this to the plaintiff. This talk took place in the course of two or three days. I told Ram Kishunji 'The plaintiff will not believe my words unless you write a letter to him.' Then Ram Kishun had written a letter to the plaintiff in my presence and handed it to me open. There was no one when I had been there." . . . "I came to the plaintiff with the letter and I too explained to the Plaintiff that this time Ramkishun offered also to pay interest on the

hundies and to deliver on his return to Calcutta his title deeds by way of security and that he should agree to it. The plaintiff then said to me 'Remember well to draw a hundi on Ram Kishun immediately on the expiration of the term promised by him.' "

The letter referred to was produced. It is as follows :

"From Ram Kishen to B. Madho Das. Sir my compliments to you. I send herewith 4 hundis for Rs.1,00,000. Sign them and send them with interest to Rajah Shimbhu Narain Singh. I shall after I have reached Calcutta send you the interest in 15 or 20 days or you may otherwise draw a hundi. . . . A sum of nearly Rs.1,48,000 will be found due to you in respect of the Nij account up to Sambat 94. I shall pay the whole of this sum together with interest according to account up to November 1883 and shall not make another promise nor shall I give you the trouble to renew the Rajah Saheb's hundis. I shall write the particulars to you after I have compared what you have written. The rest is all right. Dated 29th January, 1888." The witness said he told Ram Kishen the respondent would not believe his word unless he wrote a letter to him, and yet there is nothing in this letter about the most important matter. In a later part of his evidence he gave a different account of when the letter was written. He said that subsequently to the writing of the letter came the proposal for the delivery of documents. "Baboo Ramkishun had proposed the delivery of documents, I myself made no inquiry from Ramkishun regarding the documents. On the contrary Ramkishun himself had said 'This time the plaintiff does not trust me and does not accept the hundi in favour of the Rajah Sahib. Therefore I myself shall deliver the title deeds of houses to him when he or his man comes.' Ere the writing of this letter Ramkishun had not in my presence made mention of the delivery of the documents." It is evident that at this stage of his examination, having seen the effect of the letter upon what he had before said, he sought to get out of the difficulty by saying that the proposal to deliver the documents was made after the letter was written ; but then it may be asked why if, as he had said, the respondent would not believe his words without a letter, he did not have this proposal added in the

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letter, and why, if he told the respondent of the offer, the latter did not notice that it was not in the letter and was satisfied without having it in. Which is the more probable, that the witness has not told the truth about what passed between him and Ram Kishen and what he told the respondent, or that if he has the letter would have said nothing about it? It is to be observed that Ram Kishun, the only person present, had left Calcutta after the adjudication of insolvency and could not be found. Most likely the witness knew this and had no fear of being contradicted or punished for giving false evidence, and he must from his position have been considerably under the power and influence of the respondent. About the deposit of the title deeds the witness said the he and Bhagwan Das went to Calcutta by order of the plaintiff to take the title deeds; they called on Ram Kishen and said, "Please give us what you promised at Benares and leave to go back." The witness Bhagwan Das and Ram Kishen were there; there was no one else; he demanded the title deeds from Ram Kishen according to his promise. Ram Kishen put them off on two or three days successively, and finally took the papers which were in the cloth bundle with a list in English out of a box and gave them to the witness, who made a list of them in Hindi. There were thirty-three documents and fifty-five papers connected with them. The witness requested Ram Kishen to write a letter and give it to him; and Ram Kishen said, "There is no occasion for a letter. Take away these papers without it as the letter if written will require registration, &c." The witness said that when they were not accompanied by any letter or any other writing, how could the transaction be considered to be a mortgage; and thereupon he said, "Take them away as I say, such is the practice in the town." Their Lordships doubt whether it can be the practice in Calcutta to take a mortgage by deposit of title deeds without a memorandum in writing; but it may be suggested that Ram Kishen said this because he wished to conceal the transaction as it would affected his credit. The witness went on to say that he left the papers with Babu Gambhir Chand for three or four days until he went back to Benares, when he took them from



him and went to Benares and delivered them to the respondent. Bhagwan Das, who was in the respondent's service and had been his gomashtha for thirteen or fourteen years, deposed that Buldeo and he went from Benares and reached Calcutta on the next day, and went to Ram Kishen instantly and saw him at his office ; that they said to him they were ready for the purpose for which he wanted them, and he asked them to come to him on the next day or the day after ; so far as he believed, they went to him on the next day in the afternoon ; he took them upstairs to his private room and brought a bundle from a box ; there was a list in it in English, and the bundle contained title deeds. Ram Kishen, having seen the list and the papers, was giving title deeds to Buldeo after marking his list. Buldeo prepared a list of title deeds in Hindi in the order in which Ram Kishen gave them to him. The number of the papers was compared with both lists, and Buldeo said, " Please give a letter and cash also. It would not be proper to give the papers alone to the plaintiff." Ram Kishen replied, " I tried to make arrangement for money but I could not succeed in that behalf. It will be irregular to write a letter in connection with this mortgage. It is the law of the town of Calcutta, I shall pay the money within the time agreed upon. As the plaintiff has lost patience now I will very soon get the title deeds returned by payment of money. It will be invalid to write a letter for it will require registration." Then the witness said, " Babu Sahib, i.e. the plaintiff, would not be pleased without taking money. Please give money along with this." He replied, " There is no opportunity now. I shall remit money as soon as possible and get the things returned." Having taken the list and papers, they went to the firm where Gambhir Chand was a gomashtha, and Buldeo said to him, " Please keep these papers. I shall take them back while going to Benares." Buldeo having opened the bundle, the papers were counted with reference to the list and taken by Gambhir Chand. They went to him five or six days afterwards and took the papers from him, and the next day left Calcutta for Benares. On their arrival at Benares, the papers were given by them to the respondent, and he ordered them to go and get the same

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credited in the account-book of the firm, which was done by Saligram Munib. In a later part of his evidence the witness said that when Gambhir Chand returned the bundle of papers to Buldeo he read four or five of the papers; that the papers which he read contained both Hindi and Persian; he did not recollect whether Gambhir Chand said anything whilst reading the papers or not.

The judges of the High Court have said that after mature consideration they had come to the conclusion that the testimony of these two men is substantially and in all its main characteristics correct and faithful. Their Lordships greatly doubt whether, having regard to the position of the men and the want of corroboration in writing, this opinion could reasonably be come to. Gambhir Chand, who said he was the Munib gomashtha of one of the largest native banking firms in Calcutta and had been their gomashtha for about twenty-six years, was a witness for the respondent. He deposed that Bhagwan and Buldeo kept title deeds with them about two years, before the trial. The title deeds were with them for about three or four days; he asked what were the papers, and they answered they got them from Babu Ram Kishen. A bundle of documents was shewn to the witness, and he said, "These are the papers, and I recognise them by the seal of the Kazi." The witness asked them why a particular document was not stamped, and they said, "It bears the seal of the Kazi"; they pointed out other papers bearing the seal of the Kazi, and thus he then identified the papers. In cross-examination he said the only means of identification were the seals; that he had not seen the Kazi's seal before; he had never seen seals of this kind before or after the deposit of the papers; he did not know English or Persian, but he noticed the Kazi's seal. Although the identification of the papers may be insufficient, if the witness was speaking the truth when he said that papers were left with him by Bhagwan and Buldeo and they said at the time they gave them to him that they got them, from Ram Kishen, it would be some corroboration of their evidence. Their Lordships are not satisfied with the reason given by the District Judge for disregarding it. It was also



sought to corroborate Bhagwan and Buldeo by an entry in an account-book, and the evidence of Salig Ram, Ramman Lal, and Madho Lal. It is unnecessary to go into the details of this. Their Lordships agree with the District Judge, who said he did not attach much weight to this portion of the evidence. The High Court in its judgment says the entry was one which it was easy to make, and it was entered in a book which could easily be tampered with.

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The next evidence to be noticed is that of Baleshwar Prasad and Rai Shiam Kishen, upon which the High Court has laid great stress and whose integrity the District Judge said he could not for a moment question. Baleshwar Prasad, who was examined before a Commissioner, deposed that a conversation between the respondent and himself in the beginning of September, 1888, turned upon the state of affairs of Ram Kishen; that the witness said he had heard that his affairs were not at all satisfactory, and that he had left Calcutta never to return, and he advised the respondent to realize the money due by Ram Kishen to him; and the respondent answered that as far as practicable he was making endeavours to get his money. He also said he had taken certain documents relating to gardens and houses, and that Ram Kishen had also promised to allow him time to pay the money due on Rajah Sambhu Narayan Singh's hundi. He did not recollect whether the respondent mentioned to him the time when the documents were made over by Ram Kishen to him. The witness also said on cross-examination that he recollected a conversation with the respondent about the delivery of these documents on two occasions: one was when the respondent was summoned to Calcutta to give evidence relating to Ram Kishen's affairs, and the other about ten or twelve days before the trial. Shiam Kishen deposed that about the end of August or beginning of September, 1888, he had a conversation with the respondent and Ram Kishen; the respondent had said to him, "You are a friend of Babu Ram Kishen, kindly tell him to pay the debt due to me as I am in want of money"; that he spoke to Ram Kishen, who said the respondent should not be uneasy about his money, as he had given over documents to satisfy him.



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The judges of the High Court say in their judgment of these witnesses, "If this witness (Shiam Kishen) is truthful and accurate, the plaintiff's case is true. If the plaintiff's case is false, then this witness has deliberately and wilfully sworn to a false tale. There is no alternative theory. The circumspect precision as to date precludes the explanation that the witness was honest but was by mistake referring to September, 1888, occurrences of another and much later date. Similar observations apply to the evidence of Babu Baleshwar Prasad."

Now s. 21 of the Indian Evidence Act, 1872, enacts that admissions are relevant and may be proved as against the person who makes them or his representative in interest, but *they cannot be proved by or on behalf of the person who makes them* or by his representative in interest except in three cases named, of which the present case is not one. The meaning of this section is very plainly illustrated by the illustration (a) to the section. As to the evidence of Baleshwar Prasad, therefore, the judges of the High Court have given very great weight to what according to law was not relevant evidence and could not be proved on behalf of the respondent. The erroneous omission before the Commissioner and the District Court to object to its admission did not make it relevant, and their Lordships must in this appeal, as the High Court should have done, entirely disregard it. The evidence of Shiam Kishen of a statement by Ram Kishen, if the statement was made before the adjudication of insolvency, is relevant and should be considered. As to this, the District Judge said he was a young man who seemed to have vague ideas of time and space, and that this evidence was hard to believe. It has been seen that the High Court fully believed his evidence. Their Lordships, without in the least imputing to the witness an intention to give false evidence, think that the conversation he deposed to is of doubtful value. This was the respondent's case, with the addition that he had possession of the title deeds after the adjudication of insolvency on March 2, 1889, and the evidence of his attorney relating to it. The appellant sought to shew that the respondent obtained the possession after that date. For this purpose he put in a letter dated February 27, 1889,

written by Bijrawan Das, who had been the head gomashtha of Ram Kishen for seventeen or eighteen years, and addressed to Hur Kishan Das, the gomashtha of Ram Kishen, at Benares. It enclosed a letter as follows : " Sanwal Das pays his compliments to Bhai Hur Kishan Das. Show to Babu Jagmohan Dasji the very time he may ask you to shew him all the old papers in respect of the Benares property or any other place. Out of those papers give him any papers which he may think fit to be sent. Make a list of the same and make those papers over to him. He will forward them to me. Do this work quietly. Don't delay in shewing him the papers. February 27, 1889." The letter then ran : " Dear Hur Kishan Das. I Bijrawan Das pray for your welfare. In accordance with this letter shew to Babu Jagmohan Das all the papers you have about the houses. Don't speak to anybody about this. (Signed) Bijrawan Das. Give him any of these papers which he may ask you to be sent here." Bijrawan Das deposed that he was Ram Kishen's " munib " for seventeen or eighteen years in Calcutta. He was formerly in Benares, and used to attend to Ram Kishen's work there. When he went away to Calcutta, Har Kishen Das, his nephew, used to work. Ram Kishen Das regularly lived in Calcutta; and used to visit Benares occasionally. Sawal Das was his regular attorney for eight or nine months before the business fell into disorder. The deeds relating to the Calcutta property used to be kept by Ram Kishen himself, and Har Kishen Das used to keep the deeds relating to the properties in Benares, Ghazipur, and Mirzapur. About the letter he said, " When the plaintiff (the respondent) was very pressing in his demands then Babu Sawal Das gave him a letter about making over certain papers to him. Sawal Das handed that letter to me also, and I also wrote on it. That letter was sent to Har Kishen Das. That letter was written about the papers, namely, the deeds in dispute. The latter clause is in my handwriting. The plaintiff was present when this letter was written." Har Kishen Das deposed that he received the letter by post on March 1 or 2 ; that Jagmohan Das is the respondent's son-in-law ; he came to him in the afternoon of the day he received the letter, and went

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away without seeing the papers, saying he would come next morning. He came the next morning bringing a clerk with him, and, having selected thirteen bundles of papers, took them and gave a receipt for them in his own handwriting. The receipt was not produced, the witness saying that he received a letter from Sawal Das asking him to send it, which he said he had not got, and it was not produced, and he sent the receipts inclosed in a letter to Sawal Das. Afterwards, on reading a list signed by Jagmohan Das, he said the number should be twelve, not thirteen. The respondent did not after this evidence had been given offer to examine either Jagmohan or Sawal, although Har Kishen had in his examination in the Insolvent Court in July, 1889, more than seven months before the trial, deposed that he had received a letter from Sawal Das about the title deeds instructing him to send them to Jagmohan Das, and he carried out those instructions and made over the title deeds to him. It was not the duty of the appellant to call either of those persons.

Upon this part of the case their Lordships are unable to agree with the High Court in its opinion that the letter of February 27 did not refer to the title deeds in suit, and they do not see any ground for the High Court speaking of the appellant's "case being surrounded with difficulties, ambiguities, and demonstrated falsehoods. the main part of their position being almost certainly shown to be untrue." Upon the whole of the evidence they are of opinion that the respondent failed to prove that the title deeds were deposited as a security for his debt, as he alleged; and they will humbly advise Her Majesty to affirm the decree of the District Court, omitting from it the exception from the costs of defendant No. 2 (the appellant), of the costs of the witnesses Gregory and Apcar and Baba Kumar Guka and Norendro Nath Sen, which should not have been disallowed, and to reverse the decree of the High Court and order the appeal to it to be dismissed with costs. The respondent will pay the costs of this appeal.

Solicitors for appellant: *Lattey & Hart.*

Solicitor for respondent: *T. C. Summerhays.*



GRENON AND OTHERS . . . . . PLAINTIFFS ; J. C. \*

AND

LUCHMEENARAIN AUGURWALLAH }  
AND OTHERS . . . . . DEFENDANTS.

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May 14, 15 ;

June 27.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Indian Contract Act, 1872, ss. 40, 94—Place of Delivery—"At any place in Bengal"—Rights of Purchaser as to Place of Delivery.*

Where the contract place of delivery is expressed to be "at any place in Bengal," a subsequent term stating that the place of delivery is "to be mentioned hereafter"—

*Held*, that s. 94 of the Indian Contract Act does not apply, and that the buyer has the choice of place, subject to the express condition that it must be in Bengal, and to the implied one that it must be reasonable. The term as to mentioning hereafter is legally superfluous, especially having regard to s. 49, but cannot on that account be construed as importing that the place was left over for future agreement.

**APPEAL** from a decree of the High Court (March 3, 1893), reversing a decree of Hill J. (Aug. 8, 1892).

The object of the suit was to recover Rs.13,000 as damages for the non-performance by the respondents of a contract to deliver 2000 maunds of good, fresh and clean new Purneah indigo seed of the growth of season 1890—1 at Rs.8 8 *α*. per maund, delivery to be made at any place in Bengal in March—April, 1891, and to be paid for by draft at thirty days' date from delivery, the place of delivery to be mentioned thereafter. The plaintiff averred that he on or about March 20, 1891, gave notice to the defendants that he required 1000 maunds to be delivered at the Howrah Station of the East Indian Railway by March 30, and the remaining 1000 maunds at the same place by April 30 then next; and that, as the defendants stated their inability to deliver any portion of the seed during the month of March, but that they would deliver the whole 2000 maunds from their godowns by the said April 30, he, the plaintiff, informed the defendants that he accepted their proposal

\* *Present*: LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD JAMES OF HEREFORD, and SIR RICHARD COUCH.

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to deliver the whole of the seed by April 30, and that if by "their godowns" they intended their godowns at Pertabgunge, he would be willing to arrange to take delivery there, provided the railway freight and despatching charges from the Pertabgunge godowns to the Howrah Station were deducted from the contract price of the seed; but that if otherwise, he the plaintiff must adhere to his former notice, and would require delivery at the Howrah Station. And the plaintiff further alleged that the defendants thereupon promised to deliver at Howrah, but did not, whereby the plaintiff lost the profits he would have otherwise made, which he estimated at Rs.13,000.

Pertabgunge here referred to is the centre of the Purneah district, and from there the best Purneah seed is procured. It is situate on the north side of the Ganges at a considerable distance from the Howrah Station, to which the seed is brought down by railway.

Howrah Station is on the right bank of the Hooghly, opposite to Calcutta; and Sulkeah, hereafter referred to, is on the same bank, but about a mile-and-a-half distant from Howrah towards the north. Here the defendants used to store seed in godowns belonging to Messrs. Moran & Co., to whom they paid so much per bag for storing their seed.

The question raised by the issues and now material was whether the defendants had discharged themselves from their obligation under their contract by being prepared on April 30, 1891, to deliver the seed contracted for to the plaintiff at their Sulkeah godowns.

Hill J. held that, on the evidence, it was not proved that Grenon had assented to take delivery at Sulkeah instead of Howrah, but had, as he was entitled to do on the true construction of the contract, fixed Howrah as the place of delivery and adhered to it; and that, therefore, the delivery at Sulkeah, as proposed by the defendants, was not in accordance with their contract, and he fixed Rs.7000 as the amount of damage.

On appeal, the High Court was of opinion that, were it not for the final words of the brought and sold notes, "the place of delivery to be mentioned hereafter," the construction contended



for by the plaintiffs, and adopted by Hill J., would have been correct, but that the effect of the addition of those words was to shew that the intention of the parties was that the place of delivery should be left for further agreement, and, as no such further agreement was ever arrived at, "no contract had come into existence at all, but only an agreement as to price, to be carried out if the other terms of the contract should eventually be arranged"; but the Appellate Court declined to rest its decision on that ground, as it had not been so contended by the defendants and was not necessary to be decided.

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The judgment of Petheram C. J. concluded in these words :—  
"Assuming that the words do prove a contract, it is a contract to sell 2000 maunds of seed within March and April at a price, without any provision whatever as to delivery; and the question is, What obligation to deliver does such a contract impose upon the seller? Sir G. Evans, for the buyer, argues that the case is within the provisions of s. 49 of the Indian Contract Act read with the illustration; but this I do not think can be the case, as, if all the provisions as to delivery are taken out of this contract, there is no express agreement to deliver at all, and the case is one to which s. 49 does not apply, but is the ordinary case of a sale of goods without any special promise as to delivery such as is contemplated by s. 94; and in such a case the seller is not under any obligation to send the goods to the buyer or to any place at which he may require them. Even then, if there was any binding contract at all, I think that the defendants were not bound to send the seed to Howrah Station, and that by refusing to do so they have not broken their contract."

Sects. 49 and 94 of the Indian Contract Act are as follows :—

Sect. 49 · "When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

" Illustration.

" A. undertakes to deliver a thousand maunds of jute to B. on a fixed day. A. must apply to B. to appoint a reasonable place



J. C. for the purpose of receiving it, and must deliver it to him at  
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Sect. 94 : " In the absence of any special promise as to delivery, goods sold are to be delivered at the place at which they are at the time of the sale ; and goods contracted to be sold are to be delivered at the place at which they are at the time of the contract for sale, or if not then in existence at the place at which they are produced."

*Cohen, Q.C., and Mayne*, for the appellants, contended that on the true construction of the contract, constituted by the bought and sold notes, they had the right to fix the place of delivery provided that it was within the limits of Bengal, reasonably and not capriciously selected. They accordingly fixed it at the Howrah Station. They were ready to take delivery at Pertabgunge with a due allowance for the cost of transit to Calcutta. Otherwise they insisted on delivery at Howrah and not at Sulkeah, the reason being that the seed which came to Howrah by rail from Purneah would be true Purneah seed, whereas they were apprehensive that the seed delivered from the respondents' godowns at Sulkeah would include old seed, mixed seed, and bad seed coming from other districts, for which apprehension the evidence shewed that there were good grounds. It was contended that s. 94 of the Indian Contract Act did not apply to the case, having regard to the terms of the bought and sold notes.

*Lawson Walton, Q.C., and Branson*, for the respondents, contended that the High Court was right in construing the notes as providing that the place of delivery was to be mentioned hereafter—that is, as might be subsequently agreed upon. Assuming that there was a complete contract, it came under the provisions of s. 94 of the Indian Contract Act as a sale of goods without any special promise as to delivery. Consequently the respondents were not under any obligation to send the seed to the appellants or to any place the appellants might name, and they had not broken their contract by declining to send it to Howrah Station. They were ready to deliver at their own godowns as prescribed by s. 94 ; and the evidence shewed that

the appellants had consented to the Sulkeah godowns as the place of delivery.

*Mayne*, replied.

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LORD HOBHOUSE. The action which gives rise to this appeal is founded on a contract made through Thomas & Co. as brokers for both parties. It is in the usual form of bought and sold notes, dated October 27, 1890. The sold note addressed to the vendors, who are defendants, is as follows :—

“ New Mart, Calcutta,

27th October 1890.

“ Dear Sirs,

“ We have this day sold by your order and for your account, to our principals, 2000 (Two thousand) maunds of good fresh and clean new Purneah indigo seed to be of the growth of season 1890.91 at Rs.8. 8 (Eight rupees eight annas) per maund.

“ The seed to be delivered at any place in Bengal in March and April 1891 and to be paid for by draft at 30 days' date from date of delivery.

“ The seed to be packed in good strong bags and each bag to contain two maunds only.

“ The place of delivery to be mentioned hereafter.

“ Terms and conditions as above.

“ Brokerage  $2\frac{1}{2}$  per cent.

“ We are,

“ Dear Sirs,

“ Your obedient servants,

“ J. Thomas & Co.,

“ Brokers.

“ To Babus Muckon Lall, Gobindram. ”

The bought note is in exact correspondence.

There has been dispute whether the defendants ever recognised the plaintiff Grenon, who was sole plaintiff in the first instance, as the principal interested in the contract. That



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matter was decided against the defendants by Hill J., who presided at the trial, and it is not raised in this appeal.

The dispute which did arise and still exists between the parties relates to the place of delivery. Ultimately it came to a question between two places ; the plaintiff insisting on delivery at the Howrah Railway Station, and the defendants refusing to deliver except at their own godowns at Sulkeah. After much discussion through the brokers, the defendants wrote to them on May 1, 1891, as follows :—

“ Dear Sirs,

“ Contract No. 27 dated 27th October 1890.

“ We waited all day yesterday to give delivery of the indigo seed sold to you from our Sulkeah godowns, but as you failed to take delivery, we consider the contract at an end and cancelled.”

Upon that the action was brought.

The defendants contended that in the course of the correspondence the plaintiff had bound himself to accept their godowns at Sulkeah as the place of delivery. After a careful examination of the evidence, Hill J. decided that point also against the defendants. They have renewed their contention here, but without persuading their Lordships, who do not think it necessary to say anything more than that they entirely concur with Hill J. on this point.

That leads to the question principally discussed at the Bar, how the contract is to be construed with reference to the place of delivery. The plaintiff contends that the place is to be some reasonable place mentioned by himself. The defendants contend, first, that the place was left over for future agreement, so that there is no concluded bargain until the parties have come to that agreement. Failing that argument, they contend; secondly, that the seller can discharge his liability under the bargain by delivering, or offering to deliver, the goods at any reasonable place within the specified limits.

The former of these arguments was considered fully by the learned Chief Justice, who expressed an opinion in favour of its soundness, but did not decide the case on that ground, because



the defendants' counsel had not argued it. He held, indeed, that if the contract had contained only the first sentence relating to delivery it would be very difficult to say that the seller had not contracted to deliver at any place in Bengal which the buyer might select. But he thought that the second sentence modified the meaning of the first; otherwise it would have no effect. The only way of making it effective is, the Chief Justice says, to construe it as meaning that the parties are to agree on the place. That conclusion has been ably supported here at the Bar.

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Their Lordships agree that the first sentence relating to delivery gives the choice of place to the buyer, subject only to the expressed condition that it must be in Bengal, and to the implied one that it must be reasonable. But they cannot see how the choice which is given by the words "to be delivered at any place" is taken away, or converted into a deferred agreement, by the statement that the place is "to be mentioned hereafter." That is a very unsuitable expression by which to reserve a point for subsequent agreement. It would be quite simple to say "to be agreed on hereafter," if that were meant. But it is only "to be mentioned," and the obvious meaning of that term is that the place is to be mentioned by the party who according to the former part of the agreement had the right of mentioning it.

It is true that with such a meaning the sentence in question adds nothing of value to the document; it merely takes notice that some place of delivery is to be mentioned more definite than the very wide area of Bengal. The addition is natural enough, and though it may be legally superfluous, such superfluities are not unknown in agreements. The principle of giving a meaning to all expressions is a sound one; but it does not justify the importation of a meaning which the expression does not of itself suggest, for which another expression equally short and simple would more readily be used, and which materially affects the rights of the parties.

The learned Chief Justice considers that the contract should be read as if all the provisions for delivery were taken out of it. Then, he says, it would fall within s. 94 of the Indian Contract

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Act, which deals with contracts where there is no special promise as to delivery, and which in the circumstances of this case would prescribe that the seed should be delivered where it is produced. But under any construction of the final sentence it contains a special promise as to delivery, and a delivery bounded by area, though it is true that the area is so large as to require further delimitation. Moreover, the contract is not to deliver at some place to be chosen or assented to by the seller, but at any place without restriction except the area of Bengal. It requires nothing more for completion than a mention of the place, and so far from falling within s. 94, seems rather to resemble the contracts contemplated in s. 49, where the promisee has not to make any application for performance, but no place is fixed. In those cases not only has the promisee the right of naming the place, but there is thrown on the promisor the duty of applying to the promisee to appoint a reasonable place.

Hill J. did not enter into any discussion of arguments such as these. He simply stated his opinion that the plaintiff was entitled by the terms of the contract to ask the defendants for its performance at the place selected by him, namely, Howrah Station. For the reasons above assigned, their Lordships have to express their agreement with him, and their dissent from the opposite view of the High Court.

There is a further question as to the amount of damages. That depends upon the price of indigo seed at the time when the contract should have been performed. Hill J. estimated the price at Rs.12 per maund. His estimate rests partly on oral evidence, and partly upon two contracts made by Thomas & Co. for the sale of indigo seed—one on April 4 and the other on April 30, 1891. He says that the rate under the earlier contract is Rs.13 per maund, which is the case; and that the rate under the latter is Rs.12 8 annas. As regards this latter contract, the learned judge seems to have been misled by the circumstance that the same document contains a contract for the sale of Shirkarbhoom seed at Rs.12 8 annas. The price of the Purneah seed is Rs.15.

The learned judge says that there is evidence to shew that



at the end of April rates were running from Rs.12 to Rs. 13 8 annas. In fact, the evidence shews that the Calcutta rates were higher; the lower rates mentioned by the learned judge appear to be those at Pertabgunge, the principal mart in Purneah; and something substantial (the plaintiff puts it as high as Rs.2, but at least 8 annas) has to be added for freight to Howrah, and other expenses. The only evidence to the contrary is that of Balaram, one of the defendant's firm, who says that at the end of April they sold this seed in Calcutta at Rs.6, and before that at Rs.5 8 annas. If this were true, it is incredible that the defendants should not gladly have taken the seed to Howrah for the contract price of Rs.8 8 annas.

Their Lordships do not go very minutely into this question because the plaintiffs' counsel do not ask for an enhancement of damages on a higher basis than Rs.13 per maund, and they have fully proved their case for as much as that.

By Hill J.'s decree additional plaintiffs, now represented by the appellants Juggun Nath and Ramjee Dass, were placed on the record, and the defendants were ordered to pay to the plaintiffs Rs.7000 with interest and costs of suit. The High Court decree simply dismissed the suit with costs in both Courts. The proper course now will be, to discharge the decree of the High Court; to order the defendants to pay the costs of appeal in that Court; to vary the decree of the First Court by substituting the sum of Rs,9000 for Rs.7000; and in other respects to affirm that decree. Their Lordships will humbly advice Her Majesty in accordance with this opinion. The respondents must pay the costs of this appeal.

Solicitors for appellants : *Wrentmore & Swinhoe.*

Solicitor for respondents : *J. F. Watkins.*

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claimed to take in priority to the appellant as son to an elder daughter who had predeceased Kattama. That claim eventually succeeded, the judgment in his favour being reported in Law Rep. 8 Ind. Ap. 99, and Dhoraisinga took possession, and died on July 9, 1883.

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His eldest son, the respondent, took possession as his heir; whereupon the appellant sued to eject him, claiming that his title as the only surviving grandson through the younger daughter was preferable to that of the respondent, who, as great-grandson, was earlier in line, but later in degree.

The respondent defended his title by contending that succession was no longer traceable to his great-grandfather, but that when his own father succeeded it was as full owner, whose estate consequently devolved on his son in preference to all claiming through a remoter ancestor.

The issues which raised this contention are as follows :—

“ 1. Whether on the death of Dhoraisinga Tevar succession should be traced from the maternal grandfather as alleged by plaintiff, or from Dhoraisinga Tevar himself as contended by defendant ?”

“ 3. Whether as contended by the plaintiff on the death of Kattama Nachiar the estate devolved upon defendant's father and the plaintiff as joint family property, and after the death of Dhoraisinga Tevar the property devolved upon the plaintiff as survivor of the two grandsons.

“ 4. Whether, as contended by the plaintiff, Dhoraisinga Tevar's possession was such as not to constitute him a fresh stock of descent, but he took the property only as manager by reason of the impartibility of the estate subject to the right of the plaintiff to succeed to the enjoyment of the estate upon the death of Dhoraisinga Tevar.

“ 5 Whether on the death of Dhoraisinga Tevar the plaintiff is entitled to succeed to the zemindary in preference to the defendant by virtue of the plaintiff being the surviving grandson of the Istimirari zemindar and the defendant being only his great-grandson.

“ 6. Whether, as contended by the plaintiff, the rule of succession to the zemindary is that the eldest of a class succeeds,



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 1896 preference to the male issue of such eldest member of the  
 ——— class.”

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The District Judge held that when once an estate has vested in a male owner, the rule of Hindu law is that he takes a complete estate, and that on his death his heir succeeds; that consequently in this case the daughter's son took as full owner, and become a fresh stock of descent his own heir succeeding at his death. It further found that the parties to the litigation never did constitute and never could have constituted a joint Hindu family holding the estate as co-parceners and subject to the law of survivorship, because they were sons of separate fathers, who were themselves in no sense members of a joint Hindu family; but that the property, having been held to be impartible, the appellant had no interest in it during the lifetime of Dhoraisinga. He also held that there was no evidence of a custom in the zemindary that all the members of each class should be exhausted before any one in the next class or degree could take, and in the absence of such evidence he held that the respondent's right of succession was prior to that of the appellant.

The High Court affirmed this judgment.

The judgment of Muttusami Aiyar J., so far as material, is as follows :—

“ As regards the first issue. viz., whether succession is to be traced from the last male holder or his maternal grandfather, appellant's contention is that, when a person succeeds to an obstructed heritage, that person is not, whether a male or female, a full owner. There is, however, no warrant for it in the Mitakshara. The general rule of Hindu law is that, when a male heir succeeds a male owner, the former is as much full owner as the latter, the principle being, as stated by Manu, Ch. IX., v. 187, that to the nearest sapinda the inheritance belongs. The only recognised exception to it is that, when a female, such as a widow or daughter, succeeds a male owner, her succession is a case of interposition between him and his next sapinda, on the authority of Katyayana, who directs that, upon the death of such female, the last male owner's (and not



her own) heirs shall take the heritage. This text is referred to and the history of introduction in the Mitakshara of widow and daughter among heirs is explained in *Muttuvaduganadha Tevar v. Dora Singha Tevar*. (1) As for obstructed and unobstructed heritage (sapratibandha and apratibandha), the distinction is material only to the extent that, in the one case, the nearer male heir excludes the more remote, whilst, in the other, the doctrine of representation excludes this rule of preference. It is founded upon the theory that the spiritual benefit derived from three lineal male descendants such as son, grandson and great-grandson, is the same, though, among collateral male heirs, the quantum of such benefit varies in proportion to the remoteness of the male heir from the deceased male owner. Hence it is that the text of Yajnavalkya, cited in Mitakshara, Ch. II., s. 1, vv. 2 and 3, premises the death of a male owner without male issue, and enumerates his heirs in the order in which they are entitled to succeed, adding that, on failure of the first in the order in which they are enumerated, the next in order is the proper heir. Thus the rule that to the nearest sapinda the inheritance belongs applies alike whether the heritage is obstructed or unobstructed with this difference, viz., that, when the last full owner leaves sons, grandsons and great-grandsons, their sapinda relationship confers equal spiritual benefit on him, though their blood relationship is not the same, and that they are all co-heirs within the meaning of the rule. The decision of the Subordinate Judge on the first issue is, therefore, correct.

“The third issue is whether, upon the death of Kattama Nachiar, the zemindary devolved upon Dhoraisinga Tevar and appellant as joint family property, and whether, upon the death of the former, it devolves upon the latter by right of survivorship. It is suggested for appellant first, that it is joint family property, and secondly, that his right of survivorship excludes respondent from succession. The right of survivorship, as recognised by the Mitakshara, presupposes two things, viz., a subsisting coparcenary in respect of the property in litigation

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(1) Ind. L. R. 3 Mad. 330, 331.

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and the death of the last male owner without *male issue*. In the case before us, respondent is Dhoraisinga Tevar's son, and even assuming that the estate was common both to appellant and Dhoraisinga Tevar, no right of survivorship can arise in appellant's favour. Again, coparcenary presupposes a common descent from the same paternal ancestor and community of interest in the property in dispute, and as daughters are transferred by marriage to the gotras or the families of their husbands, neither can they nor their sons be said to be coparceners so as to constitute a joint Hindu family in the true sense of the expression. Further, to what extent an impartible estate can be treated as joint family property, though it vests in one of its members by the custom of primogeniture, and to what extent a right of survivorship can be deduced from impartibility, was considered by this Court in *Naraganti Achamma v. Venkatachalapati* (1), and the decision in that case rests on the view that, before succession can pass from one line of descent to another, the former must be extinct, and that the proper heir is not necessarily the coparcener nearest in blood to the original owner, but the nearest coparcener of the senior line. Again, how far it is joint family property as between father and son for the purpose of invalidating a mining lease granted by the former was considered in *Bresford v. Collector of North Arcot* (2), and it was held in that case, on the authority of the decision of the Privy Council in *Sartaj Kuari and Another v. Deoraj Kuari* (3), that, even as between real coparceners, an impartible estate devolving in accordance with the custom of primogeniture is *not* joint family property for all purposes. The right of survivorship on which appellant insists was properly held by the Subordinate Judge not to subsist.

“ The fourth issue was raised with reference to the contention that Dhoraisinga Tevar's interest in the zemindary was only a qualified interest, and that it consisted only in the right of management subject to appellant's right to succeed to him on his death, and the Subordinate Judge was right in disallowing

(1) Ind. L. R. 4 Mad. 252, 267.

(2) Ind. L. R. 13 Mad. 197.

(3) L. R. 15 Ind. Ap. 51 ; S. C. Ind. L. R. 10 Allah. 283.



it also. In the first place, Dhoraisinga was owner and *not* a mere manager, and his ownership was that of a male sapinda and not a qualified heritage as in the case of a widow or daughter. The Smrities from which his right of Succession is deduced by the Mitakshara in Ch. II., s. 3, v. 6, are those of Vishnu and Manu. The former says, 'In regard to the obsequies of ancestors, daughter's sons are considered *son's sons*'; and the latter observes, 'By that male child whom a daughter, whether formally appointed or not, shall produce from a husband of an equal class, the maternal grandfather becomes the grandsire of a son's son; let that son give the funeral oblation.' The Smriti on which the mitakshara rests the daughter's succession is that of Vrihaspati, who says, 'as a son, so does the daughter of a man, proceed from his several limbs.' It is then clear that in the case of the daughter the ground of succession is that she is her father's sapinda, because she proceeds from his limbs like a son, but in the case of daughter's son it consists in the union of blood relationship through the mother with that of sapinda relationship in its spiritual sense, as in that of son's son or the son of an appointed daughter under ancient Hindu law. Here I may also draw attention to the Vedic texts cited in Smritichandrika and to its effect, as discussed in Ch. IV., vv. 4—8. Those texts shew that there is a passage in the Taittiriya Veda to the effect that females and persons wanting in an organ or sense or member are incompetent to inherit, that accordingly Bodhayana says that females are incompetent to inherit, and that the author of the Smritichandrika considers that what they take is *not* Dayam or pure heritage but only an "amsom," or an allotment in the nature of a provision or a qualified heritage. Reading the foregoing passages together, it follows that, when the daughter succeeds, she takes the heritage as an amsom or as a provision for life with power of alienation on exceptional grounds, or, as it is usually put, as a qualified heritage, and that, as she succeeds solely by reason of blood relationship, her succession is constituted into a case of interposition between two consecutive male heirs who are both blood relations and sapindas in a spiritual sense. It is also clear, on the other

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hand, that, when the daughter's son succeeds, he succeeds as a regular sapinda in the same way in which a son's son or the son of an appointed daughter succeeds, that the Vedic text and the disability consequent upon it do not apply to him, that he inherits from his mother's father, though after her death and not from her, that he is a full owner like a son's son or an appointed daughter's son, and that like every regular or male sapinda he also becomes a fresh stock of descent when the right to inherit once vests in him. The appellant's contention, which ignores this distinction between the daughter and the daughter's son as heirs at law, cannot be supported.

"As regards the fifth issue, it is sufficient to state that nearness or remoteness of relationship to the Istimirari zemindar is perfectly immaterial. As observed by the Privy Council in *Neelkisto Deb Burmono v. Beerchunder Thakoor and Others* (1), and by this Court in *Naraganti Achamma v. Venkatachalapati* (2), 'it is the nearest in blood to the last male holder that is the proper heir and *not* the senior member of the whole group of agnates.'

"In connection with the sixth issue, it is argued for appellant that, like daughters, daughters' sons inherit as a class, and that as all the heirs in each class must be exhausted before the estate devolves on another class, appellant is a preferable heir by right of survivorship. This contention is again, as observed by the Subordinate Judge, clearly not tenable. It ignores the principle that, when by the custom of primogeniture the senior male in a class of heirs excludes the others, the exclusion continues not only during his life, but so long as he leaves lineal heirs competent to succeed to him. If an impartible estate devolves on the eldest of three sons by the custom of primogeniture to the exclusion of the rest, the preference due to seniority of birth is not a mere personal privilege, but a heritable interest which descends to his lineal heirs as his representatives. The doctrine of representation as between the father and his three lineal descendants consequent on the notion that he is reborn in them obtains on each occasion the succession opens up, and the eldest son's right to exclude his brother is continued to his lineal male heirs. It is then said

(1) 12 Moore's Ind. Ap. Ca. 523.

(2) Ind. L. R. 4 Mad. 267

that when an impartible estate devolves on the eldest of several daughters, the other daughters take by right of survivorship. Each daughter's succession is only a case of interposition, and as she dies the next in seniority is her father's heir, and thus inherits the estate as heir and not by right of survivorship as recognised by the Mitakshara."

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*Cozens-Hardy, Q.C.*, and *Branson*, for the appellant, contended that, having regard to all the circumstances of this family, Dhoraisinga did not constitute a fresh stock of descent. The ordinary Hindu law was not applicable to this impartible zemindary, whose devolution was controlled by the custom of the family, having regard to the particular incidents of its tenure and mode of enjoyment. According to all the evidence in the case, it should have been held that, by the rule of descent applicable to this particular zemindary, daughters' sons take as a class, and all the members of that class should be exhausted before a member of the next class can take. At the death of Dhoraisinga the appellant answered that description, being the sole surviving member of it. He was, as being equally with Dhoraisinga a daughter's son to the original self-acquirer, though by a younger daughter, preferable heir to the respondent, whose right of inheritance did not accrue until the right of the class to which he belonged accrued on the extinction of the earlier degree.

*Mayen*, for the respondent, was not heard.

The judgment of their Lordships was delivered by

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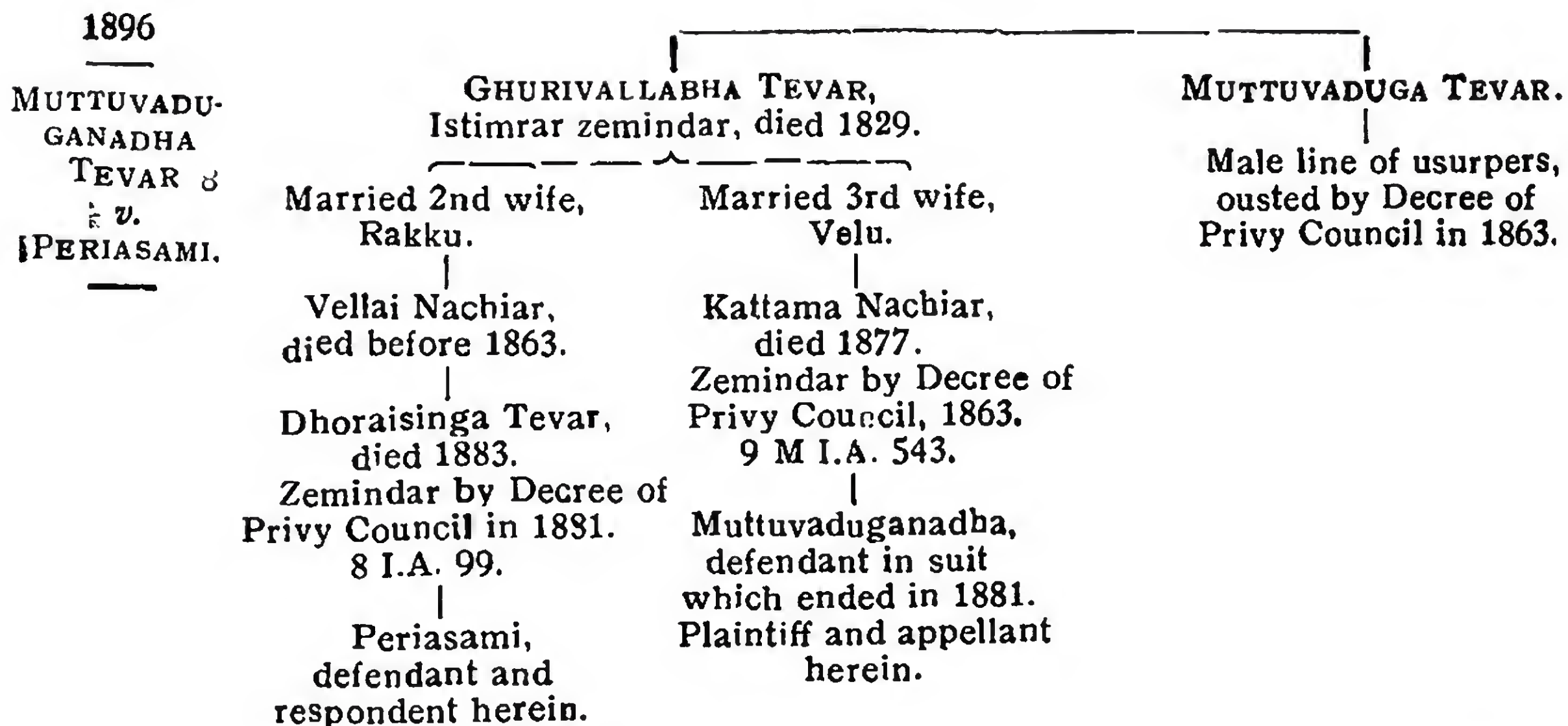
LORD HOBHOUSE. Her Majesty in Council is called upon to decide yet another dispute arising out of the succession to the zemindary of Shivagunga. The nature of the dispute is best stated by reference to the pedigree (*see overleaf*) set out in the case of the respondent, who was the defendant below.

The effect of the litigation which ended in the year 1863 was to establish that the zemindary was the self-acquired property of the Istimrar zemindar, and that it devolved upon his younger and only surviving daughter, Kattama, in preference to collateral heirs.



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## Pedigree.



Kattama died in 1877, when her son, the present appellant, who was plaintiff below, claimed to be entitled in preference to Dhoraisinga, the son of Kattama's sister, who was eldest daughter of the Istimrar zemindar. In that litigation, which ended in the year 1881, it was established that though the zemindary was impartible, Kattama took it for the ordinary Hindu woman's estate, and that upon her death it devolved not on her heir, but on the heir of her father.

Dhoraisinga being dead, the plaintiff has preferred a fresh claim to the zemindary. He maintains that the Istimrar zemindar is still the root of title, and that he, being a grandson, is entitled to succeed in preference to the defendant, who is a great-grandson. The defendant maintains that Dhoraisinga acquired full and complete ownership, and became a fresh root of title, so that the property descended to his son.

Both Courts below have decided that the defendants' contention is right. The plaintiff's claim is founded on the idea that the present question is the same as that which arose on Kattama's death. Then the Istimrar zemindar was the root of title whose heir was to be sought; therefore, it is argued, he is so now. That argument loses sight of the difference between the imperfect or obstructed heritage of a female and the full heritage of a male successor. It is not disputed by the



appellant's counsel that, if the property were partible, Dhoraisinga would have taken an absolute ownership constituting him a new stock. But it is contended that a different rule is applicable to an impartible estate, and that if the inheritance of such an estate once becomes obstructed, it is always obstructed, so that on the death of each owner the true successor is the heir of the last unobstructed owner. They have not produced any authority nor suggested any principle for such a distinction. When an estate is impartible it is enjoyed in a different mode from that prescribed by the ordinary Hindu law ; but the inheritance is to be traced by the same mode, unless some further family custom exists beyond the custom of impartibility.

Their Lordships do not discuss the question of survivorship, because Mr. Cozens-Hardy distinctly stated that he rests his claim not on survivorship between the plaintiff and Dhoraisinga, but on the plaintiff's greater proximity to the true root of title. But on both points they express their agreement with the learned Hindu lawyer who presided at the hearing of this case in the High Court, and whose services have recently been lost to that Court.

Their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Solicitor for appellant : *R. T. Tasker.*

Solicitors for respondent : *Lawford, Waterhouse & Lawford.*

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MATHURA DAS AND ANOTHER . . . . . PLAINTIFFS;  
AND  
RAJA NARINDAR BAHADUR PAL AND }  
OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

*Mortgage—Construction—Post diem Interest—Continuing Cause of Action—  
Limitation—Act XV. of 1877, Arts. 115, 116.*

Where a mortgage deed contained a covenant for payment of principal and interest at a fixed rate "within a year," and a further covenant not to transfer the mortgaged estate till payment in full of principal and interest :—

*Held*, that the mortgagees, who sued more than seven years after due date, were entitled to recover the principal with interest at the stipulated rate to the date of the decree of the First Court, and at the rate of 6 per cent, thereafter. Post diem interest was recoverable under the contract, and not as damages for its breach.

*Narindra Bahadur Pal v. Khadim Husain* (Ind, L. R. 17 Allah. 581) and preceding Allahabad decisions overruled.

Even if recoverable as damages, the cause of action was a continuing one, and was not barred by arts. 115, 116 of Act XV. of 1877 for the six years next before suit.

APPEAL from a decree of the High Court (April 27, 1891) affirming a decree of the Subordinate Judge of Gorakpur (Sept. 7, 1888).

The suit was brought upon a registered mortgage bond executed by Rajah Bhawani Ghulam Pal, the predecessor of the respondents, on February 17, 1880, whereby mouzahs Chahti and Dhai Pokhar in the pergunnah of Matoli were mortgaged to secure Rs.19,157 advanced by the appellants' firm. The material covenants are set out in their Lordships' judgment.

The prayer of the plaint was to recover the principal amount with interest to the date of suit (June 19, 1888) at the rate of Rs.1 6*a*. per mensem. The Rajah's defence was limited to the question of interest. He disputes the claim to interest after the expiration of a year from the date of the bond, inasmuch as no condition in regard thereto was either agreed upon or

\* *Present* : LORD WATSON, LORD HOBHOUSE, and SIR RICHARD COUCH.

recorded in the bond. He also contended that the property was not hypothecated for the payment of interest, and that consequently the six years' limitation applied thereto, and barred the recovery of interest beyond that period.

The Subordinate Judge decreed in favour of the appellants for the principal and one year's interest only. He held that there was no express agreement to pay interest after one year, and that no such agreement could be implied. If the claim for subsequent interest was put on the ground of damages for delay in payment, he held that it was barred by limitation, since the breach occurred more than six years before the date of suit, and there had been no acknowledgment of liability by the defendant sufficient to satisfy s. 19 of Act XV. of 1877. He gave interest on the decreed amount at the rate of 12 per cent. per annum from the date of the decree. He founded his judgment on the authority of *Mansab Ali v. Gahabchand*. (1)

The High Court (Straight and Tyrrell JJ.) affirmed this decree. The material part of their judgment is as follows :—

“ The plaintiffs have appealed, and their appeal is confined to two matters : first, to the mode in which the learned Subordinate Judge has construed the bond ; and second, to the question of post diem interest. In other words, two questions only are at issue before us in appeal, namely, whether the terms of the mortgage bond, dated February 17, 1880, provided for the payment of interest after the expiry of one year from the due date of the bond ; and whether, regarding the post diem interest as damages, the bar of the limitation of art. 116 of Act XV. of 1877 is saved by any acknowledgment or acknowledgments of the kind mentioned in s. 19 of such last mentioned Act.

“ As to the first of these two points, there does not appear to me any room for doubt as to the language of the instrument of mortgage, which is clear. It is as follows : ‘ I shall pay off without any objection the said amount in full, principal and interest, at the rate of Re.1-6 per cent. per mensem, within a year . . . . If I fail to pay off the amount within the fixed term, the said bankers shall be competent to realize the amount,’ &c.

(1) Ind. L. R. 10 Allah. 85.



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“ There is no distinction I can see to be drawn between the present case and that of *Sri Niwas Ram Pande v. Udit Narain Misr* (1); and as the considered judgment in that case was delivered after we had heard Pandit Bishambar Nath for the plaintiffs-appellants upon the first question in this case, the reasoning we applied in that judgment is applicable to this appeal, and it is not necessary to repeat here the remarks we then made. I am satisfied that, upon the language of the instrument, dated February 17, 1880, there was no covenant for the payment of post diem interest, and that the only footing upon which the plaintiffs can be recouped for the loss they have sustained by the non-payment of the mortgage money upon the due date, is by way of the damages, the limitation to a suit for which is provided by art. 116 of the first schedule of the Limitation Act. That being so, we have now to consider whether that limitation stands in the way of their getting any damages. The due date of the mortgage bond sued upon was February 17, 1881, and the suit was brought on June 19, 1888, which would be seven years and some three or four months after the date when the amount of the instrument of mortgage became payable.”

The judgment then considered the question of acknowledgment of liability, and arrived at the conclusion that the Subordinate Judge was right upon that point, adding that “ it is not without regret that I have placed this construction upon these documents. The defendant had the use of the plaintiff's money for a considerable period of time, and the rate of interest in the bond is not an unreasonable one, which, but for the difficulty of limitation, I should not have hesitated to treat as a fair basis for estimating damages.

*H. A. Gifford, Q.C., and Cowell*, for the appellant, contended that on the true construction of the covenant, whether the amount was paid before or after the expiration of a year, interest was to be paid at the prescribed rate until the day of payment. There was no provision that the appellants should be bound to realize the amount at the expiry of the specified term, but only

(1) Ind. L. R. 13 Allah. 330.

that they should be competent to do so; the defendant covenanting not to transfer the security "until payment of this amount principal and interest." A further provision was that "the amounts paid by me should be first credited to the payment of interest, and the balance should be credited to that of the principal," which it was submitted related to interest continuing after the expiration of a year, and not to interest which was payable only for a year or less.

Even if the covenant were restricted in the manner stated by the judgments of the Courts below, interest at a reasonable—that is in this case the prescribed—rate was recoverable as damages, or otherwise by law. If art. 116 of Act XV. of 1877 applied, still six years' interest out of the seven years and three months sued for were recoverable, the cause of action being a continuing one. Reference was made to Act XXXII. of 1839, Act XXVIII. of 1885, s. 2; *Sri Niwas Ram Pande v. Udit Narain Misr.* (1) [LORD WATSON referred to *Bhagwant Singh v. Daryao Singh* (2); *Bikramjit Tewari v. Durga Dyal Tewari* (3); *Narindra Bahadur Pal v. Khadim Husain* (4): from which it would be seen that the High Courts of Allahabad and Calcutta were at variance as to the true construction of covenants of this nature. See also *Lala Chhajmal Das v. Brijbhukan Lal.* (5)]

*Mayne*, for the respondent Raja Narindar, who alone appeared, referred to all the terms of the mortgage bond in suit, and contended that no interest was made a charge on the property except for one year. The expressions used, having regard to the known construction which the Courts of the province were in the habit of putting on them, should be deemed to disclose on the part of both parties to the bond an intention that interest should be limited to one year. Interest beyond that time was not recoverable under the contract; and as regards a claim to it eo nomine as damages, that was barred by limitation: see arts. 116 and 132 of Act XV. of 1877. He referred to *Cook v. Fowler.* (6)

(1) Ind. L. R. 13 Allah. 330.

(2) Ind. L. R. 11 Allah. 416.

(3) Ind. L. R. 21 Calc. 274.

(4) Ind. L. R. 17 Allah. 581.

(5) L. R. 22 Ind. Ap. 199.

(6) L. R. 7 H. L. 27.

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J. C. The appellants were not heard in reply.

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1896. July 31. The judgment of their Lordships was delivered by

SIR RICHARD COUCH. By the deed dated February 17, 1880, Rajah Bhawani Ghulam Pal, the defendant, now represented by the respondents (the first of whom alone defends this appeal), mortgaged and hypothecated a certain mouzah to Cheddi Lal, the predecessor in title of the plaintiffs, who are now appellants, to secure the principal sum of Rs.19,157. The deed then proceeded thus : "And I covenant and record that I shall pay off without any objection the said amount in full, principal and interest, at the rate of Rs.1. 6. per cent. per mensem, within a year, without raising any objection whatever. If I fail to pay off the amount within the fixed term, the said bankers shall be competent to realize the amount by any means possible, from my person and the properties mortgaged, and from other properties belonging to me, and I or my heirs neither have nor shall we have any objection whatever to it. Until the payment in full of this amount, principal and interest, I shall not transfer, either directly or indirectly, the mortgaged property to any one else, and if I do, such a transfer should be deemed to be false and inadmissible. The amounts paid by me should be first credited to the payment of interest, and the balance should be credited to that of the principal, and I shall have them entered on the back of the document."

No payment having been made, the plaintiffs instituted this suit on June 19, 1888, for the usual mortgage decree. The Subordinate Judge of Gorakpur passed a decree in the usual form for the sum of Rs.22,313, being the principal of the loan with one year's interest, and a further sum for costs. The rest of the claim he dismissed. He held, on the authority of a decision of the High Court in a similar case, that the mortgage deed does not provide for interest after the first year. Being then pressed to give damages by way of interest, he held that such a claim being compensation for breach of a contract was barred by arts. 115 and 116 of the Limitation Act.

The plaintiffs appealed to the High Court, who affirmed the



decision of the Subordinate Judge on both points, and so dismissed the appeal, though without costs. From that decree the present appeal is brought. Supposing the construction put by the Courts below on the deed to be correct, the appellants still ask why they should not recover six years' arrears of interest by way of damages. It is very difficult to see why. The principal debt was not time-barred, and it was not paid. Every day that it remained unpaid there was a breach of contract, and the bar of time applies only to breaches occurring six years before suit.

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But it is not necessary to dwell further on this point, because their Lordships think that the Courts below have misconstrued the deed. Indeed, they do not find in the judgments any attempt to arrive at the meaning of the deed by and examination of its terms. Both Courts appear to have followed decisions in other cases, according to which it would seem that in the High Court of Allahabad a fixed rule of construction has been laid down for transactions of this kind without much regard to what the parties have actually said.

The latest case of the kind was decided as late as June, 1895, *Narindra Bahadur Pal v. Khadim Husain and Others* (1), after the decision of the case now under appeal; but it proceeded on the same judicial lines, and as it was referred to a Full Bench because of a discrepancy between the Allahabad and the Calcutta High Courts, it may be taken as the most authoritative statement of the views of the Allahabad Court.

The instrument to be construed resembled very closely that on which this Board is now engaged. The mortgagor covenanted to pay the principal loan with interest within one year. He then hypothecated land to secure "the said sum of money," and covenanted not to transfer the land "until I pay in full the whole of the amount of principal and interest." . . . "If I fail to pay the money with interest," the mortgagee was to recover "the said sum of money with interest" from the property. And there was a provision that payments by the mortgagor should be credited, first to interest and afterwards to principal.

(1) Ind. L. R. 17 Allah. 581,

J. C.        Upon that instrument the Court delivered the following  
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“ In our opinion the construction of the mortgage deed admits of no doubt. The term was one year from the 28th of April, 1879. The mortgagees could on the expiration of that year sue for and recover the principal moneys remaining due at the expiration of that year; in certain events the mortgagees could before the expiration of that year sue for and recover the principal and interest due at the date of their suit. On the other hand, the mortgagor could, by payment to the mortgagees or into the Treasury of the Court of the principal and interest due, redeem the mortgage even before the expiration of the year. The payment of post diem interest was not provided for by the mortgage deed, and, certainly, according to the ordinary construction of such deeds in these provinces, which we believe to be correct, was not contemplated by the mortgagor. The conditions in the mortgage deed binding the mortgagor not to transfer the mortgaged property, and giving the mortgagee power to recover the principal money with interest if the mortgagor failed to pay the principal with interest on the due date, are ordinary conditions commonly inserted in mortgage deeds in these provinces, whether it is intended that interest shall run only to the due date or shall run not only to the due date but after due date and until the principal sum shall have been paid. Such conditions are never construed in this Court as indicating that interest shall continue to run after the due date.”

Now there is not, as the learned judges seem to imply, any different mode of construing language in the North-West Provinces from that which prevails elsewhere. Conditions in mortgage deeds must not be disregarded because they happen to be common ones. If it be true that covenants not to transfer till principal and interest be paid are sometimes inserted, when the intention is only to secure interest for a single year, such intention must be gathered from other parts of the deed itself. If such a covenant, not being controlled by other parts of the deed, does not mean that interest is to run till payment, it is very difficult to say what it does mean. The covenant to



pay within a year ties up the hands of the mortgagee for that year and protects the mortgagor ; but it rarely happens, and is rarely contemplated, that the mortgagor should actually pay by that time. The provision for applying payments to reduction of interest points strongly to the expectation of the parties that the transaction will not be closed when the fixed day of payment arrives. The construction of the High Court ascribes to the parties an intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest, that the creditor shall have no remedy provided by contract, but shall be driven to treat the contract as broken, and to seek for damages, which lie in the discretion of a jury or a court, and are subject to a different law of prescription. It appears to their Lordships that though contracts are not unfrequently found to be of that imperfect nature, it is more reasonable to ascribe to the parties the intention of making a perfect contract, especially when such a contract is of a very common kind, and suitable to the ordinary expectations of persons entering into a mortgage transaction.

To their Lordships' understanding the meaning of the contract before them is plain enough. The mortgagee cannot, except in certain events, enforce payment for a year. The mortgagor may pay at any time, and is bound to pay in a year's time, "the said amount" (i.e., Rs.19,157, the only amount yet mentioned) "principal and interest," i.e., whatever interest may be due at the time of payment, whether for a year or a less time. If he fails the mortgagee may proceed to realize "the amount," the obvious meaning of which is, principal and interest to the time of realization. Then comes the covenant not to transfer until payment "of this amount" (i.e. the amount to be realized) "principal and interest." And then the proviso that payments shall be applied first in reduction of interest, and entered on the back of the document. The strictest construction of the words is in accordance with the usual intentions of the parties to a simple mortgage. Why they should be wrested from that construction in favour of an unusual and most improbable intention is not explained.

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Their Lordships hold that the plaintiffs are entitled to recover their principal debt with interest at the rate mentioned in the mortgage deed up to the date of the Subordinate Judge's decree, and thereafter at the rate of 6 per cent. per annum. The decree of the High Court should be discharged.

The respondents ought to pay the whole costs of suit in both the Courts below. The case should be remitted to the Subordinate Judge to take the proper accounts, and give further directions.

Their Lordships will humbly advise Her Majesty to this effect.

The respondents must pay the costs of this appeal.

Solicitors for appellants : *Ranken Ford, Ford & Chester.*

Solicitors for respondent : *Pyke & Parrott.*



THAKUR NITR PAL SINGH . . . . DEFENDANT;

AND

THAKUR JAI SINGH PAL . . . . PLAINTIFF.

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May 6. 7 ;  
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ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

*Custom of Primogeniture—Custom of Gaddinashini—Wajib-ul-arz—Customary  
Descent of Lumbaradarship—Admissibility of Evidence.*

Where the Courts below differed as to whether the custom of primogeniture prevailed in an ancient Rajpoot family which had existed for many generations :—

*Held*, by their Lordships, on a consideration of various lines of evidence (not separately conclusive) and of probabilities that the custom was established.

Although there is no necessary connection between the custom of gaddinashini and the custom of primogeniture, evidence which treats them as identical in the particular instance should not on that account be disregarded.

Where a wajib-ul-arz was silent as to family custom of inheritance, but states that the lumbaradarship devolves according to the family custom of primogeniture :—

*Held*, to be material evidence as to the devolution of the estate by the same custom.

So also is the opinion of an arbitrator, called in by the family to settle the question of primogeniture amongst an earlier generation, as neighbour and friend who had had dealings with the estate ; even though his actual award was not acted on.

APPEAL from a decree of the High Court (April 15, 1889) reversing a decree of the Subordinate Judge of Agra (Dec. 24, 1886).

The facts are stated in the judgment of their Lordships.

*Mayne and Wallach*, for the appellant.

The respondent did not appear.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The question in this appeal is whether the ancestral property of a Rajpoot family long settled in the Agra district devolves according to ordinary Mitakshara law, or

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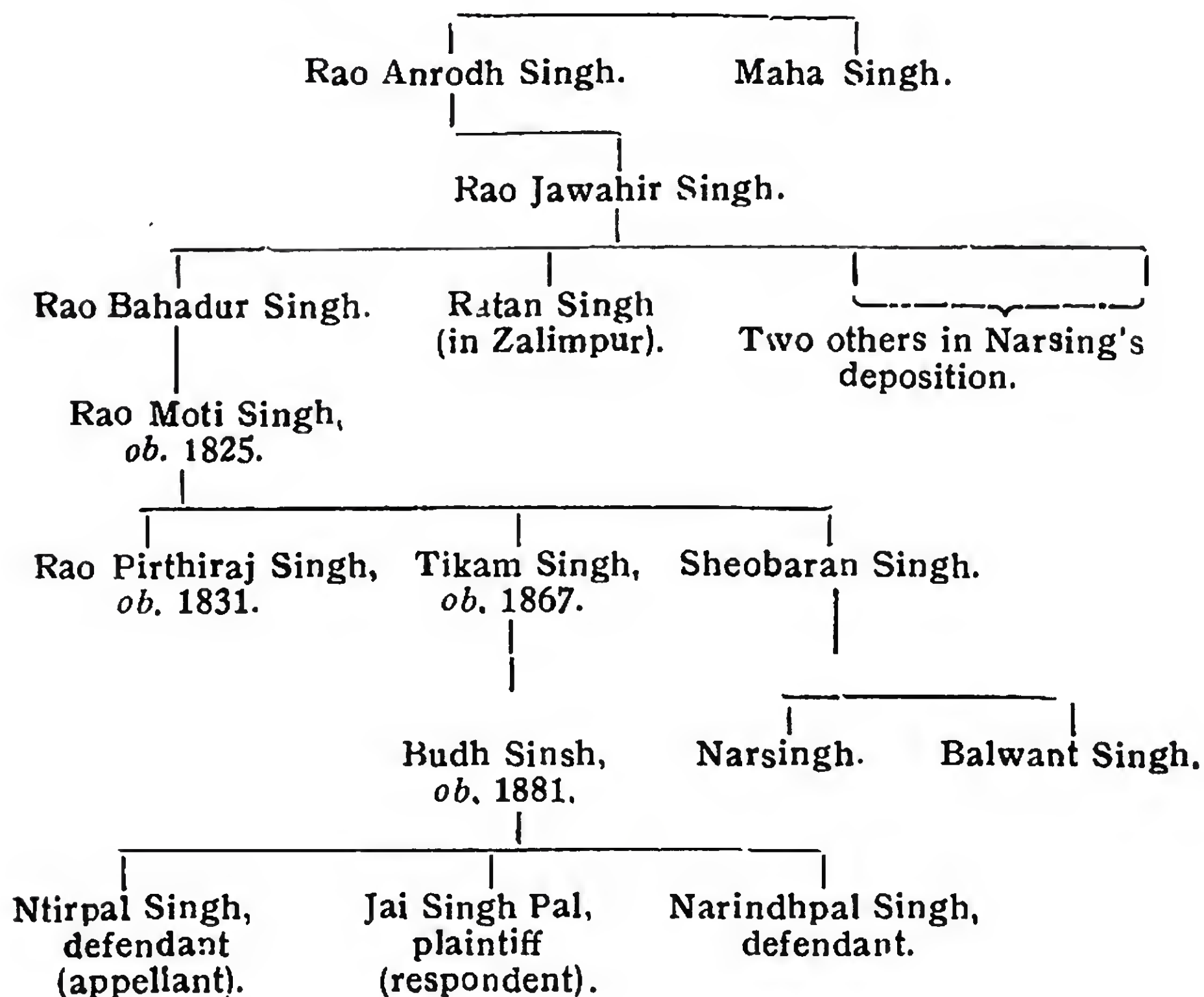
June 27.

\* *Present* : LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD JAMES OF HEREFORD, and SIR RICHARD COUCH.

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is subject to the custom of primogeniture. The Courts below have differed in opinion upon the evidence: the Subordinate Judge thinking that the custom is established, and the High Court that it is not; so that it becomes the duty of this Board to say whether the evidence is such as to make it right to restore the original decision.

The family is one of Rajpoots belonging to a clan, apparently numerous, called Jadon Thakurs. Their estate and place of residence is the talook or riasat of Umargarh. One of the witnesses named Bhairon states that he is the jaga (something apparently corresponding to a bard or herald or genealogist) of this family and of all other Jadon Thakurs; and that he kept books compiled by himself, his father, and his elders, containing pedigrees of those families. He produced the book relating to Umargarh, which professes to shew the heads of the family and some of the younger sons for twenty-seven generations. Some parts of the evidence will be better understood if so much of it as relates to the last six generations is set out here.



The Plaintiff is a younger son of Budh, claiming to have the estate divided. The eldest son, who resists that claim, is the



principal defendant. Another son who did not join in the plaintiff's claim was made a defendant, and now takes no active part in the proceedings. Both the younger sons are minors.

The Subordinate Judge of Agra decided in favour of the custom, and dismissed the suit. Omitting some minor points, the main grounds of his decision may be stated under the following heads : (a) The pedigree made out by Bhairon, coinciding as it does with a large amount of tradition among the Umargarh family and their kinsfolk the Jadon Thakurs, shews that the family is ancient and noble, and has been in possession of the talook of Umargarh and of various villages appertaining thereto for many generations. (b) The family property has never been the subject of partition. (c) The heads of it ascertained by primogeniture have been installed on the gaddi with public ceremonies. (d) The first claim for partition by a younger son, made in 1831, was resisted and finally defeated in 1845. (e) The property in suit has since been enjoyed by the head of the family as sole owner. (f) The members of the family, with the exception of the actual claimants for partition, have declared their belief in the custom of primogeniture. (g) There is substantial evidence to the same effect among their kinsfolk the Jadon Thakurs. (h) The evidence adduced by the defendant stands unrefuted by any substantial evidence for the plaintiff. Their Lordships will proceed to shew the objections taken by the High Court to these positions, and to examine the evidence bearing on them.

*Head (a).*—The High Court point out the inconclusive nature of Bhairon's pedigree. No doubt a document of this kind, compiled from papers handed down from jaga to jaga and probably supplemented by tradition, must be taken with much reserve ; and its obscurity is increased in this case by the fact that it is written in a peculiar dialect or character known only to the jaga, and by the further circumstance that it is difficult to understand from the record what is represented as the precise language of the book, and what is the language of Bhairon himself. Their Lordships hesitate to attach importance to

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such expressions as “succeeded to the gaddi,” or to the appearance of the dignified title “rao” which is prefixed to the head of each generation. Still there is no suggestion that Bhairon is untruthful ; and the contradictions between his pedigree and other parts of the evidence which are dwelt on by the High Court are quite insignificant. They cannot doubt that the jaga books represent with fidelity the traditions and belief in the Umargarh family, or that the family is a noble one of very long standing in the country. Indeed, as the Subordinate Judge points out, the plaintiff has made no suggestion to the contrary. The Jadon Thakurs who give evidence for him all believe in a common ancestor many generations ago. And the High Court, though unable to attach any value to the pedigree, are satisfied that the Umargarh family is an old one, and socially of considerable importance.

*Head (b).*—But then they say that the pedigree affords no evidence of impartibility. Certainly it affords no explicit evidence, nor does it profess to do so. The High Court, however, think that the absence of partition for many generations is as consistent with partibility as with primogeniture, unless it is shewn that partition was claimed and refused. Of course, if that was shewn it would be very cogent evidence in favour of primogeniture. And it is possible that a divisible estate may remain undivided for a long time. But their Lordships do not think it probable that any great number of generations would pass without any operation of the motives under which Sheobaran acted fifty years ago and the plaintiff is acting now. Anrodh had a younger brother, and nothing is known of partition. Bahadur Singh had a younger brother (three if Narsingh is correct), and we hear nothing of partition. The High Court indeed, finding that Ratan is stated to be “in Zalimpur,” suggest that he may have been there by partition. But we find from the talook papers that in 1855 Zalimpur was vested in Tikam. The probability is rather that it was given to Ratan for maintenance, and on his death fell in to the talook. Prior to Sheobaran there is no tradition or rumour of a partition suggested on the plaintiff’s part. To put it at the lowest, that lays a ground for the favourable reception of evidence in favour of



primogeniture ; or, to put it higher, makes it probable that primogeniture is the real custom of the family.

*Head (c).*—The High Court are prepared to believe that some ceremonial of gaddinashini did take place in the cases of the defendant and his father Budh. In fact, such ceremonies are proved by numerous eye-witnesses, invited for the occasion, wholly unshaken in cross-examination, and not contradicted except by other neighbours who were not invited and did not see what took place. And as to the defendant, the evidence is corroborated by Budh's petition in the Collector's Office, which prays for a mutation of names, and which was allowed by an order of February 15, 1877, in spite of an objection made by somebody, by whom is not clear.

The High Court attenuate the singnificance of installation by two remarks. First, they say that no witness professes to have seen any similar ceremonials in respect of Tikam, Pirthi, or any other member of the family. Now Pirthi acceded in the year 1825, sixty-one years before the evidence was taken, and Tikam six years later. None of the witnesses examined is old enough to have seen them installed. But as to Tikam there is evidence that Narsingh saw him occupying the gaddi, and that Balma-kand, a Jadon Thakur, heard from his father that Tikam was placed on the gaddi and remained in its possession. His widow Bijai speaks to the same effect. Aman Singh, another Jadon Thakur, heard about the installation of Pirthi and his father Moti from the jagas. Of course, as the time becomes more remote the evidence becomes fainter ; but there is evidence of family tradition as far back as Anrodh, in accordance with Bhairon's pedigree. Their Lordships cannot concur with the opinion of the High Court that the gaddi ceremonies were invented to make evidence after the dispute with Sheobaran, nor is it easy to see the motive for making evidence at that time.

The other remark is a suggestion that there is no necessary connection between gaddinashini and primogeniture. That may be so ; but it is impossible to read the evidence without seeing that the witnesses on both sides treat the two as identical, or the former as proving the latter. Not a single question

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is put to any witness who has affirmed or denied gaddinashini for the purpose of disconnecting it from primogeniture. Not only so, but the plaintiff's uncle Sukhram, being expressly questioned on the point, says that if the gaddi custom is proved the plaintiff will not get a share. And Rajah Shunker Singh, who gives much information about family customs in the Agra district, speaks of gaddinashini and primogeniture as generally coincident. It is clear that the Subordinate Judge had no suspicion that the evidence applying to gaddinashini could be taken as not applying to primogeniture. The first suggestion of such a distinction comes from the High Court. Their Lordships think that when the witnesses affirm or deny gaddinashini they mean to affirm or deny primogeniture; and their constant identification of the two things shews how closely they are connected in the minds of the families of that part of the country. The custom of gaddinashini has clearly an important bearing upon that of primogeniture, though the connection between them may not be a necessary one.

*Head (d).*—This brings us to the stage of the family history in which actual controversies on this question have sprung up, and they require some careful attention. On the death of Moti in the year 1825, the eldest of his three sons, Pirthi, became head of the family. Whether he was formally placed on the gaddi has been discussed above; he certainly represented the estate on the Collector's books, and during his life no question as to the ownership was raised. He died in 1831, when his brother Tikam became head. It seems that immediately afterwards the widow of Moti raised a claim on behalf of the youngest son, then a minor, to have the estate divided. An agreement was made deferring the question till Sheobaran's attainment of full age, and then another agreement was made appointing Mr. Bell to be arbitrator. Mr. Bell was a proprietor of indigo works in Umargarh, and he held a mortgage created by Moti on the estate.

The precise tenor of the questions referred is one of the many things which are left in obscurity on this record. In his award, which is dated January 16, 1843, Mr. Bell states them as being the difference existing between the brothers connected



with the pretensions of Sheobaran to a joint interest in the estate. After referring to two agreements and a decree of Court, none of which are produced, and to the testimony of neighbouring zemindars and younger branches of the family, he states that custom has determined the descent of the estate in one individual. Then he refers to "the avowed inclination of Thakur Tikam Singh that his younger brother should receive such allowance as may enable him to support himself in a manner consistent with the respectability of his descent"; and proceeds to award that Sheobaran should have six villages and a plot of land in full proprietorship, and should have no further claim upon the talook.

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Sheobaran was not content with this award, but immediately afterwards sued for his full share in the estate. Tikam insisted on his right as eldest brother, and also pleaded the award. Nawab Kuar, the widow of Pirthi, who was a defendant, supported Tikam. She alleged that she was entitled to one-third of the estate, only "by reason of the family usage, and of Tikam Singh being seated on the gaddi, she has refrained from making any claim." The Sudder Amin gave Sheobaran a decree on the ground that primogeniture could not prevail except in the families of rajahs and ravats; whereas the Umargarh family did not bear either of those titles. As for the award, he held it to be invalid on grounds which have nothing to do with the present question. They were overruled by the Sudder Court, who, on the ground that Mr. Bell had decided the case in favour of Tikam, reversed the decree below and dismissed the suit. Their decree is dated December 1, 1845.

From this litigation in the Civil Court we get no additional light thrown upon the family custom, unless it be the declaration of Pirthi's widow. The Sudder Amin did not discuss it, but thought that the question of primogeniture turned on the use or non-use of certain appellations. The Sudder Court had not to express any opinion about it, and did not.

As to the bearing of the award the High Court take a view which their Lordships cannot understand. They say—

"Practically, the transaction was one of partition, dividing

J. C. the family property, and giving the allottees exclusive control  
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“ Mr. Bell, in making the award, may have considered that the practice, which is not unusual in some places, of giving one portion to the eldest brother—a larger share—was one which he might follow.

“ However this may be, we are satisfied that the award operated to transfer to Sheobaran Singh the absolute right in the awarded villages in a manner absolutely inconsistent with there being the custom alleged.”

This is in direct contravention of the language of Mr. Bell, who states that his award is not by way of partition, which is prohibited by the family custom, but by way of voluntary allowance for Sheobaran's support in a manner consistent with his position. Mr. Bell may have made his award on insufficient grounds, or without due inquiry, but his opinion is clear. And the opinion of a resident in Umargarh, who had dealings with the estate, was a friend of the family, and was so trusted by them that they called him in to settle the question of primogeniture between them, must have weight in a controversy on that subject. The suggestion that Mr. Bell did not act in good faith, but lent himself to the manufacture of evidence, has no basis of fact that their Lordships can find.

*Head (e).*—After all, the award was not acted on. On May 18, 1848, Tikam, declaring that he was full proprietor of mauza Bechupura, one of the Umargarh villages not awarded to Sheobaran, made it over absolutely to Sheobaran by way of provision and maintenance. On July 3, 1854, a wajib-ul-arz for taluka Umargarh was framed on the declarations of the mokhtars of Tikam and Sheobaran. By it Sheobaran is shewn to be owner in possession of Bechupura and pattidar of the talook of Umargarh, and Tikam appears as the owner of several villages among which are five of the six awarded to Sheobaran. It is calculated that the awarded villages were about one-third in value of the whole talook, and that the property ultimately taken by Sheobaran was much less, possibly only one-third of the amount awarded. The subsequent enjoyment has been in accordance with the recorded titles.



This change of arrangement remains totally unexplained, and the High Court appear on that account to throw blame on the defendant and suspicion on his case. If the defendant could have produced the proceedings which led up to the award they might have been material. But we are not discussing the validity or legal effect of the award, but the amount of light which it throws on the alleged custom; and it is difficult to suppose that arrangements superseding the award to the disadvantage of the younger brother would disclose circumstances to weaken the title of the elder. Of course, the plaintiff might have compelled an investigation of those matters in the First Court; but it does not seem to have occurred to anybody that it was useful to do so, and probably it was not.

The wajib-ul-arz of 1854 does not contain any statement of the family custom of inheritance. In wajib-ul-arzes of separate mouzabs made in 1876 there are statements importing that primogeniture is the custom; but as some of them are shewn to have been dictated by Budh, and perhaps all were, they do not add to the weight of his opinion shewn in other ways. The point for which the wajib-ul-arz of 1854 was used is that it contains a statement relating to lumbardars. It says that on the death of a lumbardar his eldest son becomes lumbardar according to the custom of the family.

The High Court treat this as totally immaterial, because they say the choice of lumbardar has nothing to do with the succession to the estate, and that partible estates may have the custom of hereditary lumbardars. This they prove by referring to Kasba Jalesar. It is difficult to see how Jalesar is an instance. As with so many other matters in the record, the evidence is obscure. There are two extracts from a wajib-ul-arz. No date is affixed to them. By their contents they would seem to have been framed in the lifetime of Pirthi. Scoti Ram, to whom the High Court refer as shewing Budh's dictation of the wajib-ul-arzes of 1876, knows nothing about Jalesar. Supposing these extracts to be Budh's work, their only effect is that the lumbardarship is hereditary and will go to the eldest son of the musnadrashin; and the estate also will go to his eldest son. But there are three castes in the Kasba which have

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different customs, and one of those castes (namely, the Sayad caste, which their Lordships presume to be Mahomedan) conforms to the Mahomedan law. That is quite consistent with the descent by primogeniture of the property of the riasat whose chiefs are hereditary lumbardars, and does not detract from the bearing, whatever it may be, of the devolution of lumbardarship upon the devolution of property in the same family.

A lumbardar represents the estate in all transactions with the Government. It is of importance that he should be of capacity for business, and it is usual in a joint family to appoint one of the elder members of the family. When it is found that the office devolves by primogeniture in a family (and there is no suggestion that the *wajib-ul-arz* speaks falsely), it seems to their Lordships a material circumstance to aid the conclusion that the estate devolves in the same way in the same family.

*Heads (f), (g), and (h)* may be taken together. Bijai Kuar is the widow of Tikam, and learned about the family customs from Moti's widow, and presumably from her husband. Besides speaking of primogeniture in general terms, she says that after Moti's death Pirthi obtained the gaddi, and that Tikam and Sheobaran got maintenance. The statement of Pirthi's widow against the interest she claimed as hers in the suit of 1843 has been before mentioned. On the death of Budh some inquiry was held apparently with reference to the entry of the estate in the Collector's books. One of his widows, Rathorji, also called Bijai, deposed to the mutation of names in Budh's time, and to his intention that the defendant should succeed according to the family custom. Another of his widows, Solankhi, the mother of Narindhpal, also deposes to the custom on the same occasion. Neither of those two widows have been examined in the present suit, but their depositions have been put in and treated as evidence. Narsingh, the son of Sheobaran, speaks to the succession from Anrodh's time, according with Bhairon's pedigree except that he ascribes to Jawahir three younger sons instead of one. He says that he heard from his father. He is open to the observation that he gives an impossible date to one communication from his father, that his father died when he was about eleven years old, and that he is indebted to the



defendant, to what amount does not appear. Unless it be for the debt, he does not seem to have any interest to support traditions in which he does not believe.

Seven Jadon Thakurs and another neighbouring Thakur of a different caste affirm the custom in general terms, and also establish the installation of the defendant and his father by direct evidence, and affirm other installations by tradition and hearsay. Their evidence varies in detail and is not given by vote. It is quite unshaken by cross-examination.

All this evidence is subject to the observations that it is given after the dispute with Sheobaran, that the ladies are pardahna-shinis, that the witnesses speak to what they have heard when very young, and so forth. These observations would have much greater weight if there had been any dispute before Sheobaran's time, or if there were evidence conflicting with that given for the defendant. But within the family itself there is no conflict of opinion. The plaintiff has produced no evidence but that of several Thakurs, Jadon and others, who deny the custom in general terms and in identical language. But the value of their denial, small in itself, is reduced to nothing by the fact that they also deny the installation of Budh and the defendant, which are proved by conclusive evidence. One of them indeed—Hari Ram—says that twenty or twenty-two years ago the riasat was partitioned in his presence. But he only adduces as proof some remarks which Tikam made to him quite at variance with the known facts; and he does not even know that Sheobaran ever sued for a partition.

The High Court say that the plaintiff's witnesses must have known of the custom if it had existed, and ought to be believed. But people who knew nothing of the gaddi custom or of actual installations are not likely to have known or cared anything about the custom of inheritance. There need be no imputation on their veracity, for with the exception of Hari Ram they only speak to negatives, and are guilty of nothing worse than the common error of assuming the non-existence of that which is not known to them.

Their Lordships conclude that there is no contradiction of the defendant's case; and that the propositions of the

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Subordinate Judge are established by sufficient proof. All the lines of evidence here examined converge upon the same point. Perhaps no one of them would, if standing alone, be conclusive in favour of the defendant's case ; but taken as a whole they are conclusive. The High Court should have dismissed the plaintiff's appeal, and it is now right to discharge their order and to restore that of the Subordinate Judge, and to direct that the respondent shall pay the costs of his appeal to the High Court. Their Lordships will humbly advise Her Majesty to this effect. The respondent must pay the costs of this appeal.

Solicitors for appellant : *White & De Buriatte.*

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BENGAL INDIGO COMPANY, LIMITED DEFENDANTS ;  
AND  
MOHUNT ROGHUBUR DAS . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Bengal Tenancy Act, 1885, s. 5, sub-s. 5 ; s. 25—Occupancy raiyats—Landed Tenures.*

In an action of ejectment the defendant company pleaded that they had acquired a permanent right of possession as occupancy raiyats, or that if non-occupancy raiyats their possession was protected by s. 25 of the Bengal Tenancy Act, 1885 :—

*Held*, that, having regard to s. 5, subs-s. 5, of the Act and the extent of the area in suit, they were not raiyats at all but tenure-holders ; and, further, that on the evidence the possession was in part at least not that of cultivators only but of creditors operating repayment of their debt by means of their security.

Sect. 7 of Act X. of 1859 is superseded if not wholly repealed by sect. 178 of the Act of 1885.

APPEAL from a decree of the High Court (Aug. 7, 1894), reversing a decree of the Second Subordinate Judge of Sarun (Oct. 31, 1892), which had dismissed the respondent's suit with costs.

On October 28, 1867, Ram Churn Das, predecessor in title of the plaintiff, granted to Williams for himself, and as agent on

\* *Present* : LORD WATSON, LORD HOBHOUSE, and SIR RICHARD COUCH.



behalf of the proprietor of the Barouli Indigo Factory, a simple ticca pottah for five years of 105B. 1c. 8D. of land in Barouli for the purpose of cultivating the same, either themselves or by tenants, with indigo or otherwise, at a fixed rent. Both pottah and kabuliyat contained an express provision for giving up the land at the end of the term.

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On August 17, 1872, Ram Churn Das executed to Williams a simple ticca pottah for ten years of 25 bighas of land in Barouli, and on the 18th he executed to the same person a zuripeshgi ticca patowa pottah for nine years of 240 bighas upon an advance by Williams of Rs.4500. The land was to bear a rent of Rs.1380, and the advance was to be at 6 annas interest per month. The balance of the rent, after deducting Rs.500 in repayment of the advance and interest at 6 annas per mensem, was to be paid according to stipulated instalments. Both the ticca pottah and zuripeshgi lease and the respective kabuliyats contained express provisions for surrender at the end of the term.

The meaning of the word "peshgi" is given in Wilson's Glossary, p. 414, col. 2, as "Advance (of money) payment beforehand or on account, money paid on deposit for rent."

The word "patowa" does not occur in the Glossary, and is not explained in the judgments of the Courts below.

"Ticca" is given in the Glossary, at p. 519, col. 2, as meaning amongst other things "a lease, the contractor paying a money rent for the land he cultivates; also a mortgage in which the person who advances money on landed security occupies the land and sets off the produce against the amount of interest."

The word "zuripeshgi" is the same word that is printed at p. 565, col. 1, of Wilson's Glossary as "zaripeshgi," and is compounded of "zar" or "zur" = gold money, and "peshgi" = advance, and is stated to mean "payment in advance, a deposit or engagement to advance money, a bonus or premium on a lease, an advance of money upon the farm of the revenue; money lent on a usufructuary mortgage."

On February 15, 1881, the plaintiff granted a zuripeshgi ticca patowa pottah of the whole 265 bighas to Williams, as to

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12 annas for himself and as to 4 annas for Wilson for nine years upon an advance of Rs.5000. The rent was to be Rs.1523 12, out of which Rs.550 yearly and interest at 6 annas per mensem was to be deducted in payment of the advance. Special provisions for surrender at the end of the term were contained in the pottah and kabuliyat.

On June 16, 1890, notice was served on the landlord that the tenure had been transferred to the defendants, the Bengal Indigo Company, and the landlord accepted the notice and a fee of Rs.33, for which he granted his receipt.

On October 9, 1890, the plaintiff sent to the defendant a notice to quit on Assin 30, 1298, F. S. (October 28, 1860), in pursuance of the stipulation in the lease.

On February 8, 1891, the plaintiff filed his suit in the Court of the Second Subordinate Judge of Chupra for recovery of possession, and mesne profits on the ground that the defendant was holding over.

The defendant filed a written statement in which he alleged that by virtue of twelve years' possession under the above transactions he had become a settled ryoti with right of occupancy, and that he could only be ejected for certain causes which did not exist. He also alleged that if he was not such a tenant with right of occupancy the notice to quit was insufficient.

The following were the material sections of Act X. of 1859 and of Act 8 of 1885 :—

Act X. of 1859, s. 6 : " Every ryot who has cultivated or held land for a period of twelve years has a right of occupancy in the land so cultivated or held by him whether it be held under pottah or not so long as he pays the rent payable on account of the same ; but this rule does not apply to Khamar neejjote or seer land belonging to the proprietor of the estate or tenure, and let by him on lease for a term or year by year, nor (as respects the actual cultivation) to lands sublet for a term or year by year by a ryot having a right of occupancy. The holding of the father or other person from whom a ryot inherits shall be deemed to be the holding of the ryot within the meaning of this section."

Sect. 7 : " Nothing contained in the last preceding section shall be held to affect the terms of any written contract for the culti-



vation of land entered into between a landowner and a ryot, when it contains any express stipulation contrary thereto."

Act VIII. of 1885, s. 5, sub-s. 2 : " ' Raiyat ' means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family ; or by hired servants, or with the aid of partners, and includes also the successors in interest of persons who have acquired such a right.

" Explanation.—Where a tenant of land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of cultivation notwithstanding that he uses it for the purpose of gathering the produce of it or of grazing cattle on it."

Sub-s. 5 : " Where the area held by a tenant exceeds one hundred standard bighas, the tenant shall be presumed to be a tenure-holder until the contrary is shewn."

Sect. 45 : " A suit for ejectment on the ground of the expiration of the term of a lease shall not be instituted against a non-occupancy raiyat unless notice to quit has been served on the raiyat not less than six months before the expiration of the term, and shall not be instituted after six months from the expiration of the term."

Sect. 178, sub-s. 1 : " Nothing in any contract between a landlord and a tenant made before or after the passing of this Act . . . . (b) shall take away an occupancy right in existence at the date of the contract or (c) shall entitle a landlord to eject a tenant otherwise than in accordance with the provisions of this Act. . . . .

Sub-s. 2 : " Nothing in any contract made between a landlord and a tenant since the 15th day of July, 1880, and before the passing of this Act, shall prevent a raiyat from acquiring in accordance with this act an occupancy right in land."

The Subordinate Judge was of opinion that the leases of October 28, 1867, and of August 17, 1872, were on the face of them " ryoti leases given for cultivation of indigo fixing a certain jumma at a certain rate per bigha for specified terms. There is no peshgi or permium paid and no words indicative of mortgage."

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As to the leases of August 17, 1872, and February 15, 1881, he was of opinion that they also were ryoti leases the object of which was cultivation of the lands, and that they were “so drawn as would shew their chief object to be cultivation and not mortgage.”

He considered that there was no transfer of interest in specific immoveable property for the purpose of securing the payment of money advanced, but that these leases were cases of the absolute sale of a lease for a fixed period to which the rules common to a mortgage transaction could not be applied; as the extinction of the original debt was not solely dependent upon the receipt by the lender of adequate profits, but on the profits whatever they might be during the continuance of the lease, and that should such profits fail the debt was neither realizable from nor secured by any other resources.

He found that it was admitted that the owners of the factory had been in possession of the said lands from 1279 F. S. (September, 1871), holding them for the purposes of cultivation upon due payment of the stipulated rent, and that therefore the predecessors of the appellant company were settled ryots and had held the disputed lands as a ryoti holding from before the lease of February 15, 1881, and being so in possession of the land as a ryoti holding for more than twelve years had acquired a right of occupancy therein which had been transferred to the appellant company, whose purchase had been recognised by the respondent.

He held, further, that the conditions in the leases as to giving up possession on the expiry of the lease would have the effect of barring the acquisition of a right of occupancy, and were therefore not legal nor binding under the provisions of s. 178 of the Bengal Tenancy Act (Act VIII. of 1885).

On the question of notice, he held that even if the appellant company had not the status of an occupancy ryot the respondent was bound under the provisions of s. 45 of the Bengal Tenancy Act to have given notice to quit six months before the expiry of the said lease, and, not having done so, was not entitled to eject the appellant company except under the pro-



visions of s. 25 of the said Act. He therefore dismissed the suit with costs.

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The High Court held that on the construction of the leases no right of occupanay had been acquired; and that the case depended upon the construction of s. 7, Act X. of 1859. They referred to *Pandit Sheo Prokash Misser v. Ram Sahoy Singh* (1), a Full Bench decision, and held that the stipulation as to surrendering on the 'expiry of the lease of February 15, 1881, was an express stipulation which prevented the acquisition of a right of occupancy. It was clear they considered that there was no ryoti holding at all, that the lease under which the lands were last held was a zuripeshgi lease, the main object of which was to provide for the payment of the zuripeshgi money, and that this " was the purpose for which the right of tenancy " under which the appellant company claimed to hold was originally acquired.

*Branson*, and *Buckland*, for the appellant company, contended that the High Court was in error, in that the judges had made no reference to s. 178 of the Bengal Tenancy Act, and had overlooked the repeal of Act X. of 1859. They omitted also to notice that the lease of February 15, 1881, was made at a date which was after July 15, 1880, and before the passing of the Act in 1885, being the period referred to in clause 2 of s. 178 of the Bengal Tenancy Act, 1885. It was contended that the judges ought to have held that under the leases of October, 1867, August, 1872, and February, 1881, the lessees therein named acquired a right to hold the lands comprised therein for the purpose of cultivating the same with indigo or other crops. Also, that under the leases the holding of the appellant company and its predecessors in title was a ryoti holding, and that the lessees were ryots within the meaning of the Bengal Tenancy Act, 1885. On the true construction of that Act the lessees, the appellant company, had by holding the land continuously for more than twelve years, either by themselves or their predecessors, become settled ryots, and had acquired occupancy rights in the land.

(1) 8 Beng. L. R. 165.

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The leases, it was contended, were only leases and not mortgages, and the payment of money in advance was not by way of loan, but was only a mode of paying rent in advance. It did not cease to be payment of rent and become a loan merely because the payment was in anticipation of the due date; and in any event, as the respondent had not given notice of his intention to eject six months before the expiration of the lease of 1881, he was not entitled to a decree.

*Mayne*, for the respondent, was not heard.

The judgment of their Lordships was delivered by

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LORD WATSON. The appellant company are owners of the Barouli Indigo Factory, which they acquired in April, 1890. The respondent is proprietor of the entire 16 annas of Mehal Barouli, portions of which were occupied by the owners of the factory from September 14, 1867, until September, 1890, under a series of leases from the respondent and his predecessors. These were : (1.) a ticca pottah of 105 bighas, 1 cottah, and 8 dhoors, for five years ending in September, 1872; (2.) a peshgi patowa ticca, for nine years ending in September, 1881, of the 105 bighas, 1 cottah, and 8 dhoors included in the preceding lease, together with additional land bringing up the total area to 240 bighas; (3.) a ticca pottah, of same date with the last, of 25 bighas for ten years ending in September, 1882; and (4.) a zuripeshgi ticca patowa pottah, of the whole 265 bighas included in the two previous leases, for an additional term ending in October, 1890.

The first and third of these documents were in the ordinary terms of a lease for cultivation. The second and fourth of them had this peculiarity, that at their commencement the tenants advanced to the lessor a lump sum, in the one case of Rs.4500 and in the other of Rs.5000, for the liquidation of debts due to his creditors, the tenants being entitled to recover payment by retaining out of the rents payable by them a yearly instalment of the sum advanced, with interest at the rate of 6 annas por mensem. The lands were cultivated for the purpose of growing indigo; and the leases contained an express obligation by the tenants to quit occupation at their expiry.



On October 9, 1890, the last of these leases having expired, the respondent served the appellants with a notice requiring them to remove from possession, and intimating that in the event of their failure to do so a regular suit would be instituted. The notice having been disregarded, the present suit was brought by the respondent in February, 1891, before the District Court of Sarun (1.) for a declaration that the appellants had no right to retain possession, (2.) to have exclusive possession decreed to the respondent, and (3.) for mesne profits. In their written statement the appellants pleaded that they and their predecessors in the factory had acquired a permanent right as occupancy raiyats; and, alternatively, that, as non-occupancy raiyats, they were not liable to be ejected, except upon the terms and conditions specified in s. 25 of the Bengal Tenancy Act, 1885 (Act VIII. of 1885).

The Subordinate Judge gave effect to the leading plea of the appellants, and dismissed the suit with costs. On appeal to the High Court, his decision was reversed by Trevelyan and Ameer Ali JJ., who held that the second and fourth of the leases above mentioned did not create a proper right of occupancy for purposes of cultivation, and could not be made the foundation of a claim to raiyat occupancy. They further held that the appellants' defence was excluded by s. 7 of Act X. of 1859, which enacts that the provisions of the statute "shall not be held to affect the terms of any written contract for the cultivation of land entered into between a landholder and a ryot, when it contains any express stipulation contrary thereto."

Their Lordships see no reason to differ from the views expressed by the learned judges of the High Court, to the effect that the leases in question were not mere contracts for the cultivation of the land let, but that they were also intended to constitute, and did constitute, a real and valid security to the tenant for the principal sums which he had advanced, and interest thereon. The tenants' possession under them was, in part at least, not that of cultivators only, but that of creditors operating repayment of the debt due to them by means of their security. Their Lordships cannot concur in the judgment of the High Court, in so far as it is founded upon

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s. 7 of the Act of 1859 ; because that clause is superseded, if not wholly repealed, by s. 178 of Act VIII. of 1885, which does not appear to have been referred to in the argument addressed to the Court.

It is unnecessary to notice further the reasoning which prevailed in either of the Courts below, because it entirely ignores the statutory definition of the word "raiya," contained in s. 5, sub-s. 5, of the Act of 1885. It is in these terms : "Where the area held by a tenant exceeds one hundred standard bighas, the tenant shall be presumed to be a tenure-holder until the contrary is shewn." That enactment is conclusive of the present case. The land held in tenancy by the owners of the Barouli Indigo Factory, under the respondent and his predecessors in title, has from the first been in excess, and, since 1872, largely in excess of the statutory limit. The appellants are, therefore, not raiyas, either "occupancy" or "non-occupancy," within the meaning of the Act of 1885 ; and their defence to this suit is groundless.

Their Lordships will humbly advise Her Majesty to affirm the judgment appealed from. The appellants must pay to the respondent his costs of this appeal.

Solicitors for appellants : *Sanderson, Holland & Adkin.*

Solicitors for respondent : *T. L. Wilson & Co.*



MUHAMMAD IKRAM-UD-DIN . . . DEFENDANT ;  
 AND  
 MUSSAMMAT NAJIBAN . . . PLAINTIFF.

J. C.\*  
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 July 28.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

*Practice—Duplicate Decrees of High Court—Special leave to Appeal  
 without Security.*

Where the High Court had passed duplicate decrees in the same suit, one in appeal and the other in cross-appeal, and had admitted an appeal from one decree and refused it from the other, their Lordships granted special leave without requiring further security than had already been taken by the High Court.

THE respondent and her sister were plaintiffs in ejectment. On January 23, 1889, the Subordinate Judge dismissed their suit as respects two specified villages, and decreed in their favour as regards a four-sevenths share of the remainder ; the ground of the decision being that all the property in suit had belonged to Imami deceased, that the plaintiffs were whole-sisters to each other and to Imami, that defendant was husband to Imami who had conveyed to him the two specified villages. Cross-appeals were made to the High Court, the defendant contending that the plaintiffs were half-sisters to Imami and not entitled to share in her estate ; the plaintiffs contending that the defendant had failed to prove his marriage and that the conveyance of the two villages was inoperative. In the judgment of the High Court, the plaintiffs were half-sisters to Imami entitled to a moiety of her estate by Mahomedan law ; the defendant was validly married and entitled to the other moiety. The estate so to be divided included the two villages the conveyance of which was held to have been inoperative.

Two decrees were made on this judgment—one in No. 64, the defendant's appeal ; the other in No. 74, the plaintiffs' cross-appeal. They were in identically the same terms mutatis mutandis. The defendant presented two petitions of leave to

\* Present : LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, and SIR RICHARD COUCH.

J. C. appeal to Her Majesty with the result that his appeal in No. 74  
 1896 was allowed, and in No. 64 was rejected ; and accordingly the  
 — High Court transmitted to the Privy Council Office a record  
 MUHAMMAD containing all the proceedings relating to appeal No. 74, but  
 IKRAM-UDDIN omitted therefrom all papers exclusively relating to appeal  
 v. No. 64, including the defendant's memorandum of appeal to  
 MUSAMMAT the High Court, the decree in No. 64, and the proceedings  
 NAJIBAN. relating to an appeal therefrom to Her Majesty.

This was a petition in the above circumstances by the defendant for an order to the High Court to transmit the omitted papers so far as they were proper to be paid before the Council, and if necessary for special leave to appeal from the decree in No. 64.

*Cowell*, for the petitioner, contended that the Civil Procedure Code does not authorize more than one decree being made by the same Court in the same suit whether in original or appellate jurisdiction, though there was a growing practice to that effect in the Allahabad High Court. The two decrees were in fact duplicates, and if an appeal admitted from one of them did not carry with it the effect of an appeal from the other, an order might be made to that effect ; so that if one decree were modified, there should not be two conflicting decrees, each of them final, in one suit. Otherwise, that the petitioner should have special leave to appeal in No. 64 without being required to furnish security beyond what he had already filed in the High Court in No. 74. In any event, the record should be completed.

*Ross*, for the respondent, did not object, provided the papers asked for were limited to those already on the file in the High Court.

THEIR LORDSHIPS gave special leave as prayed, and directed that it should be without security. The record must be completed.

Solicitors for petitioner : *Ranken Ford, Ford & Chester.*

Solicitors for respondent : *Pyke & Parrott.*

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**"FOR YOUR MAINTENANCE" :** See HINDU WILL.

**HINDU LAW—Sale by a Hindu Widow—Consent of nearest Contingent Reversioner—Evidence of Consent—Right of Actual Reversioner.]** Where a Hindu widow sold through her husband's nearest contingent reversionary heir acting as her mokhtar a portion of her husband's estate, stating in the deed of sale that "the vendee has become an absolute owner of the share sold from the date of sale":—*Held*, that, whatever the true construction of the deed, the High Court being of opinion that the transfer was limited to the widow's interest, there being no evidence of necessity, and the reversioner not having received any portion of the consideration, his consent to an absolute transfer was not sufficiently established, and that his grandson, being next reversionary heir when the succession opened, was entitled to eject the purchaser. *JIWAN SINGH v. MISRI LAL* - - - - - 1

**HINDU LAW OF INHERITANCE—Mitakshara—Bandhus—Maternal Uncle—Descendants of Father's Paternal Aunt—Priority of Heritable Right.]** The enumeration of bandhus as heirs in the Mitakshara, c. ii. s. 6, is not exhaustive. It is an attempt to classify those heirs by sample, not to specify every member of each class. *Gridhari Lall Roy v. Bengal Government* (12 Moore's Ind. Ap. Cas. 448) followed. Consequently a maternal uncle is an heir, though not specified, and cannot be ousted by the sons and grandsons of the father's paternal aunt, who, though specified, do not on that account exclude, or obtain any priority not recognised by the principle on which that classification is based:—*Held*, also, that although a mother's half-brother may be postponed to her uterine brother, there is no authority for postponing him to more remote kinsmen. *MUTHUSWAMI MUDALIYAR v. SUNAMBEDU MUTHUKUMARASWAMI MUDALIYAR* - 83

**HINDU WILL—Construction—"For your Maintenance"—Putra poutradi krame]** Where a

**HINDU LAW—continued.**

Hindu testator gave a 4-anna share of his estate to his daughter and her son "for your maintenance," with power of making alienation thereof by sale or gift:—*Held*, that on the true construction of such gift each took an absolute interest in a 2-anna share of his estate, and the words "for your maintenance" did not reduce the interest of either to one for life only: *Held*, also, that the widow's conveyance of her share operated as a severance of the joint tenancy which had been created by the will between her and her son, and was effectual without her son's consent. *Vyadinada v. Nagammal* (L. R. 11 Mad. 258) overruled. *JOGESWAR NARAIN DEO v. RAM CHUND DUTT* - - - - - 37

—See INDIAN SUCCESSION ACT (X OF 1865).

**HOLDING FOR MAINTENANCE—Nature of grant—Evidence as to antecedent Possession—Presumption—Award)** Where an award directed that the villages in suit "given as maintenance be decreed in favour of plaintiff to continue as heretofore":—*Held*, in an action of ejectment, that evidence as to the nature of the antecedent possession of the villages, and also of the quasi-judicial acts of the arbiters, was admissible. It appearing therefrom that the villages, though originally granted to the donee rent free for maintenance, were not limited to him personally, but to him and his direct lineal descendants through males in the order of primogeniture; and that possession had followed the grant in the prescribed order:—*Held*, that the villages will not revert to the talookdar until that line of descendants has become extinct, and that the Government revenue is payable by the talookdar. *BHAIYA ARDAWAN SINGH v. RAJA UDEY PARTAB SINGH* - - - - - 64

**IMPARTIBLE ESTATE—Custom of Descent—Daughter's sons—Proof of Descent.]** An impartible estate, though it is by custom enjoyed in a different mode from that prescribed by the ordinary Hindu law, yet devolves by inheritance according to that law unless the controlling custom applies specifically to the mode of devolution, and not merely to the mode of enjoyment. There is no rule of law applicable to impartible estates that inheritance once obstructed is always obstructed, so that the root of title to an impartible estate is not the last full owner, but the last unobstructed owner:—*Held*, that the reversionary male heir who succeeds at the death of a daughter to the full estate transmits it to his own heir to the exclusion of those claiming as nearer in succession to the daughter's father. *MATTUVA DUGANADHA TEVAR v. PERIASAMI alias UDAYANA TEVAR* - - - - - 128

**INCOME TAX RETURNS :** See REGISTERED MORTGAGE.

**INDIAN CONTRACT ACT, 1872, Ss. 49, 94—Place of Delivery—"At any place in Bengal"—Rights of Purchaser as to Place of Delivery.]** Where the contract place of delivery is expressed to be "at any place in Bengal," a subsequent term stating that the place of delivery is "to be mentioned hereafter":—*Held*, that s. 94 of the Indian Con-



**INDIAN CONTRACT ACT, 1872, Ss. 48, 94—contd. LIMITATION—continued.**

tract Act does not apply and that the buyer has the choice of place, subject to the express condition that it must be in Bengal, and to the implied one that it must be reasonable. The term as to mentioning hereafter is legally superfluous, especially having regard to s. 49, but cannot on that account be construed as importing that the place was left over for future agreement. *GRENON v. LUCHMEENARAIN AUGURWALLAH* - 119

**INDIAN EVIDENCE ACT, 1872, S. 21—Admissions—Evidence—Omission to object to Evidence.]**

In a suit against an insolvent and the official assignee for sale of mortgaged property, the onus is on the plaintiff to prove that title deeds in his possession after the insolvency were deposited with him as security before the adjudication.—Evidence of admissions by him at an earlier date than the adjudication to the effect that the deeds were then in his possession are inadmissible in his favour under s. 21 of the Indian Evidence Act, 1872, not being within any of the exceptions to inadmissibility named in that section.—An erroneous omission to object to such evidence does not make it admissible.—Conflicting evidence as to the factum of the deposit examined after the Courts below had differed, with the result that the suit was dismissed. *MILLER v. BABA MADHO DAS* - 106

**INDIAN SUCCESSION ACT (X of 1865), S. 111—**

*Construction of Code—Hindu Will—Executory Gift over.]* A code must be construed according to the natural meaning of the language used, and not on the presumption that it was intended to leave the existing law unaltered.—Lord Herschell's opinion on this point in *Bank of England v. Vagliano* ([1891] A. C. 107) approved.—By the will of a Hindu who left one major and two minor sons, the eldest was appointed executor and manager during minority, and it was directed "my three sons shall be entitled to enjoy all the moveable and immoveable properties left by me equally. Any one of the sons dying sonless, the surviving sons shall be entitled to all the properties equally":—*Held*, that the period of distribution being the death of the testator, the gift to the three sons was in defeasible at that date, according to the true construction of s. 111 of Act X of 1865, made applicable by the Hindu Wills Act of 1870; and that the widow of the eldest son who died sonless after the testator's death succeeded to his share, the executory gift over not taking effect. *NORENDRA NATH SIRCAR v. KAMALBASINI DAS* - 18

**JURISDICTION:** See CONCURRENT FINDINGS. OF FACT.

**JUSTIFYING NECESSITY:** See MORTGAGE BY HINDU WIDOW.

**LANDED TENURES:** See BENGAL TENANCY ACT.

**LIMITATION—Adverse Possession—Possession under Decree of Sub-settlement—Effect of Decree and of Possession on those interested in Superior Tenure.]** In a suit in 1887 to recover a

village from a sub-settlement holder thereof, it appeared—(a) That the plaintiff's ancestor had mortgaged the whole ilaka of which the village was part under the Mahomedan dynasty in 1854; and that after Lord Canning's confiscation the mortgagee obtained in 1860 a summary settlement of the ilaka, and also a talookdari sunnud of another estate which was made to include the village in suit.—(b) That thereafter the plaintiff enforced in 1844 his right to redeem, which had been restored to him by Act XIII. of 1866, and obtained possession of the whole ilaka except the village in suit.—(c) That in 1866 the defendant obtained a consent decree in a sub-settlement suit against the settlement holder of 1860, under which he obtained and ever since held possession of the said village:—*Held*, that whatever the effect of this decree upon the superior tenure, adverse possession under it bound all persons claiming interest in such tenure, and accordingly the suit was barred by limitation. *IMDAD HUSAIN v. AZIZ-UN-NISSA* - 8

2. —Act XV. of 1877, Art. 12—Confirmation of sale—Bengal Act VII. of 1880, s. 7—Collector's Certificate.) Where the Board of Revenue discharged an order of the Commissioner, dated January 25, 1884, which had confirmed a sale by the collector in 1882; but afterwards on August 21, 1886, discharged its own order and revived that of the Commissioner:—*Held*, that the confirmation of sale dated only from August 21, 1886, and that a suit brought in July, 1887, to set the sale aside was not barred by Act XV of 1877, art. 12:—*Held*, that according to the true construction of s. 7 of Bengal Act VII. of 1880 there is no foundation for a sale thereunder until a certificate has been made by the collector strictly in manner prescribed thereby, specifying the sum due and the person to whom it is due. Such certificate, when duly made, has after service of notice thereof under s. 10 the effect of a decree so far as regards the remedies for enforcing it. *BAIJNATH SAHAI v. RAMGUT SINGH* - 45

—See MORTGAGE.

PRACTICE. 2.

**MANAGER OF COURT OF WARDS:** See ONUS PROBANDI.

**MATERNAL UNCLE:** See HINDU LAW OF INHERITANCE.

**MORTGAGE—Construction—Post Diem—Interest—Continuing Cause of Action—Limitation—Act XV. of 1877, Arts. 115, 116.)** Where a mortgage deed contained a covenant for payment of principal and interest at a fixed rate "within a year," and a further covenant not to transfer the mortgaged estate till payment in full of principal and interest:—*Held* that the mortgagees, who sued more than seven years after due date, were entitled to recover the principal with interest at the stipulated rate to the date of the decree of the First Court, and at the rate of 6 per cent. thereafter. Post diem interest was recoverable under the contract, and not as damages for its breach.—*Narindra Bahadur Pal v. Khadim*



**MORTGAGE—continued.**

*Husain* (Ind. L. R. 17 Allah. 581) and preceding Allahabad decisions overruled. Even if recoverable as damages, the cause of action was a continuing one, and was not barred by Arts. 115, 116 of Act XV of 1877 for the six years next before suit. *MATHURA DAS v. RAJA NARINDAR BAHADUR PAL* 138

**MORTGAGE BY HINDU WIDOW—Justifying Necessity—Onus probandi—Suit by Heir of Mortgagee.** In a suit by the heir of a mortgagee to establish against a Hindu's reversionary heirs the validity of a mortgage created by his widow:—*Held*, that the rule as to onus probandi laid down in *Hunooman Pershad Panday's Case* (Moore's Ind. Ap. Ca. 418, 419) applies, and that the representative as well as the original mortgagee must prove that the widow borrowed for a legitimate purpose:—*Held*, further, that general evidence to the effect that the husband died in debt, and that his widow had substituted new securities at reduced interest for old ones, did not exempt the plaintiff from proving that the particular transaction in question was justified; nor did it throw on the defendants the onus of proving the solvency of the husband's estate. *MAHESWAR BAKSH SINGH v. RATAN SING* 57

**MORTGAGOR AND MORTGAGEE — Simple mortgage—Decree for Possession—Construction.** Where under decree upon a "simple mortgage" a mortgagee obtained possession of the mortgaged property instead of a judicial sale:—*Held*, that such decree did not import foreclosure. The possession obtained thereunder was as mortgagee and involved liability to account and to be redeemed. *SRI RAJAH PAPAMMA RAO BAHADUR v. SRI VIRA PRATAP KORKONDA* 32

**OCCUPANCY RAIYATS : See** BENGAL TENANCY ACT.

**OMISSION TO OBJECT TO EVIDENCE : See** INDIAN EVIDENCE ACT, 1872, s. 21.

**ONUS PROBANDI—Consent Decree against Infant—Manager of Court of Wards—Evidence of Authority to bind the Infants.)** The onus is on a defendant in ejectment who alleges a consent decree against the plaintiff whilst an infant to shew that the consent was given by a person legally authorized to bind him. There is no presumption in favour of the decree having been duly made.—Where the Court of Wards had been defendant as representing the infant, and a consent had been given by its mokhtar, who at the time alleged its authority in that behalf:—*Held*, that effect would not be given to a decree so obtained without proof that such authority had actually been given; and that in its absence an allegation that the mokhtar acted fraudulently and collusively was immaterial. *RAJAH MUHAMMAD MUMTAZALI KHAN v. SHEORATTANJIR* 75

—*See* MORTGAGE BY HINDU WIDOW.  
REGISTERED MORTGAGE.

**PAYMENT OF CONSIDERATION MONEY : See** REGISTERED MORTGAGE.

**PLACE OF DELIVERY : See** INDIAN CONTRACT ACT, 1872.

**POSSESSION UNDER DECREE OF SUBSETTLEMENT : See** LIMITATION. 1.

**POST DIEM INTEREST : See** MORTGAGE.

**PRACTICE — Decree appointing Receiver for a Fixed Period—Discretion of the Court as to Discharge of Receiver.]** Where a judgment of the High Court in removing the senior widow of a deceased Rajah from the Managership of his estate declared that the same should remain under the control of a receiver appointed from time to time by the Court:—*Held*, that after the death of the senior widow the junior widows were not entitled to have the decree amended so far as it declared the permanent appointment of a receiver necessary and directed fresh appointments to be made as occasion might require during the lives of the widows. The decree did not in that respect go beyond the terms of the judgment. And the Court could discharge the receiver and place the senior surviving widow in control of the estate if satisfied that such course would be in the interests of all concerned. *MATHUSRI UMAMBA BOYI SAIBA v. MATHUSRI DEEPAMBA BOYI SAIBA* 28

2.—*Concurrent Findings of Fact—Limitation—Suit to set aside an adoption—Act XV of 1877, Arts. 92, 93, 118.* The rule as to concurrent findings of fact will not be departed from merely because the High Court as admitted documents tendered by the appellant which the first Court had rejected.—Where a suit was brought in 1888 to set aside an adoption in 1887 which was in substitution of an adoption in 1884:—*Held*, that even if the ground of suit was the falsity of an alleged deed of authority to adopt, neither art. 92 nor art. 93 applied. The deed was not "issued" when the adoption of 1884 was made, nor was it "attempted to be enforced" at that date within the meaning of those articles: *Held*, further, that art. 118 alone applied. *HURRI BHUSAN MOOKERJI v. UPENDRA LAL MOOKERJI* 97

3.—*Duplicate Decrees of High Court—Special Leave to Appeal without Security.]* Where the High Court had passed duplicate decrees in the same suit, one in appeal and the other in cross-appeal, and had admitted an appeal from one decree and refused it from the other, their Lordships granted special leave without requiring further security than had already been taken by the High Court. *MUHAMMAD IKRAM-UD-DIN v. MUSSAMMAT NAJIBAN* 167

**PRESUMPTION : See** HOLDING FOR MAINTENANCE.

**PRIORITY OF HERITABLE RIGHT : See** HINDU LAW OF INHERITANCE.

**PROOF OF DESCENT : See** IMPARTIBLE ESTATE.

**PUTRA PUTRADI KRAME : See** HINDU WILL.

**REGISTERED MORTGAGE—Payment of Consideration Money—Onus probandi—Income Tax Returns.]** The onus is on a mortgagor who seeks



**REGISTERED MORTGAGE—continued.**

to get rid of his liability under a registered mortgage to shew clearly that, contrary to his own admission before the registrar, he received no consideration for it, and that the deed was fictitious. —He is not relieved of that onus merely because the mortgagee has made no return to the Government for income-tax in respect of the annual interest accruing on the mortgage. **NAWAL MIRZA ALI KADAR BAHADUR v. INDAR PERSHAD** [92

**RIGHTS OF PURCHASER AS TO PLACE OF DELIVERY :** See INDIAN CONTRACT ACT, 1872.

**SIMPLE MORTGAGE :** See MORTGAGOR AND MORTGAGEE.

**SPECIAL LEAVE TO APPEAL WITHOUT SECURITY :** See PRACTICE. 3.

**SUIT BY HEIR OF MORTGAGEE:** See MORTGAGE BY HINDU WIDOW.

**SUIT TO SET ASIDE AN ADOPTION :** See PRACTICE. 2.

**WAJIB-UL-ARZ :** See CUSTOM OF PRIMOGENITURE

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